114-210

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 824. 58

JOHN PATCH, PLAINTIFF IN ERROR,

vs.

ELIAS E. WHITE.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 7, 1882.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 324.

JOHN PATCH, PLAINTIFF IN ERROR,

vs.

ELIAS E. WHITE.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Declaration	1	1
Summons	2	1
Marshal's return	3	1
Plea	4	2
Joinder and note of issue	4	2
Jury and trial	6	3
Judgment	7	3
Motion for new trial	7	3
Bill of exceptions	9	4
Plaintiff's case	9	4
Will of James Walker	10	4
Admissions by defendant	16	6
Deed from Henry Walker to Thos. Sewall, Jan'y 29, 1842	17	7
Thos. Sewall *et ux.* to John Brereton, Feb. 5, 1851	22	8
Eliza A. Drane *et al.* to John Patch, Dec. 8, 1873	26	10
Proceedings in general term	33	12
Argument and submission	34	12
Judgment	34	12
Bond	36	13
Writ of error and citation	37	14
Certificate	38	14

JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 *Declaration. Filed February* 13, 1879.

In the Supreme Court of the District of Columbia, the 13th day of February, A. D. 1879.

JOHN PATCH, Plaintiff,
vs.
ELIAS E. WHITE, Defendant. } At Law. No. 20463.

The plaintiff sues the defendant to recover two (2) undivided third parts of all that piece or parcel of land in the city of Washington, in the District of Columbia, and known and distinguished on the plats and ground plan of the said city as lot numbered three (3), in square numbered four hundred and six (406), fronting fifty (50) feet on E street north, and running back the depth of the said lot one hundred (100) feet, in which the plaintiff claims a fee simple,
2 and of which he was lawfully possessed on the 22nd day of March, A. D. 1877, when the defendant entered the same and unlawfully ejected the plaintiff therefrom, and unjustly detains the same from the plaintiff, and the plaintiff claims the possession of the said two (2) undivided third parts of the said lot of land with the appurtenances and the costs of suit.

McPHERSON & CARLISLE,
Plaintiff's Attorneys.

The defendant is to plead hereto on or before the first special term of the court occurring twenty days after service hereof; otherwise judgment.

McPHERSON & CARLISLE,
Plaintiff's Attorneys.

Summons. Issued February 13, 1879.

In the Supreme Court of the District of Columbia.

JOHN PATCH, Plaintiff,
vs.
ELIAS E. WHITE, Defendant. } At Law. No. 20463.

3 The President of the United States to the defendant, Greeting:

You are hereby commanded to appear in this court on the first day of its special term, occurring 20 days after service of this writ on you, to answer the plaintiff's suit, and show why he should not have judgment against you for the cause of action stated in his declaration.

Witness D. K. Cartter, Chief Justice.

[SEAL.]

R. J. MEIGS, *Clerk*,
By J. R. YOUNG, *Ass't Clerk*.

NOTE.—The special term of the court commence on the first Tuesday of every month except August, in which month there is no term of the court.

McPHERSON & CARLISLE.

Marshal's Return on Back of Writ.

Served copies of the declaration, notice to plead, affidavit, and this summons on the defendant the 14th day of Feb'y, 1879.

F. DOUGLASS, *Marshal.*

4 *Defendant's Plea. Filed March 5, 1879.*

In the Supreme Court of the District of Columbia, this 4th day of March, A. D. 1879.

JOHN PATCH, Plaintiff,
vs.
ELIAS E. WHITE, Defendant. } At Law. No. 20463.

For plea the defendant says: That he is not guilty as alleged.

W. D. DAVIDGE,
GORDON & GORDON,
Attorneys for the Defendant.

Joinder and Note of Issue. Filed March 5, 1879.

In the Supreme Court of the District of Columbia, the 5th day of March, 1879.

JOHN PATCH, Plaintiff,
vs.
ELIAS E. WHITE, Defendant. } At Law. No. 20463.

5 The plaintiff joins issue upon the defendant's plea.

McPHERSON & CARLISLE,
Plaintiff's Attorneys.

Supreme Court, District of Columbia, March 5th, 1879.

Between—

JOHN PATCH, Pl'ff,
and
ELIAS E. WHITE, Def't. } At Law. No. 20463. Ejectment.

McPherson & Carlisle, pl'ff's att'ys.
W. D. Davidge, Gordon & Gordon, def't's att'ys.

Last pleading filed the 5th day of March, 1879.

McPHERSON & CARLISLE,
Pl'ff's Attorneys.

To the clerk.

Court Proceedings.

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court in and for said District, commencing the fourth Monday, the 24th day of January, A. D. 1881.

MONDAY, *January* 24, 1881.

6 By order of Arthur MacArthur, justice, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal pursuant to rule of court.

* * * * * * *

THURSDAY, *March* 17*th*, 1881.

Session resumed pursuant to adjournment, MacArthur, justice, presiding.

* * * * * * *

JOHN PATCH, Pl'ff,
vs.
ELIAS E. WHITE, Def't. } At Law. No. 20463. Cal. 225.

Now comes here as well the plaintiff by his attorneys, Messrs. Merrick & Carlisle, as the defendant by his attorneys, Messrs. Davidge, Gordon & Gordon, and a jury of good and lawful men of this District, to wit, Samuel J. Spearing, John H. Gray, James M. Darnell, George H. Thompson, James Dailey, Charles S. Johnson, David B. Jackson, John F. Bridget, Francis S. Barbarin, Cato Ward, John T. Lenman, and Richard L. Cropley, who being sworn to try the issue above joined, after hearing a part of the evidence, are respited until the meeting of the court to-morrow.

7 FRIDAY, *March* 18*th*, 1881.

Session resumed pursuant to adjournment, MacArthur, justice, presiding.

JOHN PATCH, Pl'ff,
vs.
ELIAS E. WHITE, Def't. } At Law. No. 20463. Cal. 223.

Now again comes here the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after the plaintiff has closed his evidence, on their oath say: That under the instructions of the court they find said issue for the defendant; therefore it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day and recover against the plaintiff the costs of his defense, taxed at $——, and have execution thereof.

Motion for New Trial. Filed May 3, 1881.

In the Supreme Court of the District of Columbia, this 18th day of March, 1881.

8 JOHN PATCH, Plaintiff,
vs.
ELIAS E. WHITE, Defendant. } At Law. No. 20463.

Now comes the plaintiff, by his attorneys, R. T. Merrick & Calderon Carlisle, and moves the court to grant a new trial on the bill of exceptions filed in this cause.

R. T. MERRICK,
CALDERON CARLISLE,
Attorneys for Plaintiff.

Court Proceedings.

TUESDAY, *May 3rd*, 1881.

Session resumed pursuant to adjournment, MacArthur, justice, presiding.

JOHN PATCH, Plaintiff, *vs.* ELIAS E. WHITE, Defendant. } At Law. No. 20463.

Now again comes here the plaintiff, by his said attorneys,
9 and tenders to the court here his bills of exceptions to the rulings of the court on the trial of this case, and prays that the same, as duly signed, sealed, and filed in this case, be made a part of the records, which is done accordingly.

And now comes the plaintiff, by his attorneys, R. T. Merrick and Calderon Carlisle, and moves the court to grant a new trial on the bill of exceptions filed in this cause.

Bill of Exceptions. Filed May 3, 1881.

In the Supreme Court of the District of Columbia.

JOHN PATCH *vs.* ELIAS E. WHITE. } At Law. No. 20463.

The plaintiff, to maintain the issue on his part joined in this case, offered in evidence the will of James Walker, which, being admitted to be the last will and testament of said James Walker, was read to the jury, and is as follows:

10 In the name of God, Amen. I, James Walker, of the city of Washington, in the District of Columbia, being sick and weak in body, but of sound mind and memory, thanks be to God, calling unto mind the mortality of my body, and knowing that it is appointed for all men once to die, do make and ordain this my last will and testament, that is to say: Principally, and first of all, I give & recommend my soul into the hands of Almighty God that gave it, and my body I recommend to the earth, to be buried in decent Christian burial, at the discretion of my executors. And touching worldly estate, wherewith it has pleased Almighty God to bless me in this life, I give, devise, and dispose of the same in the following manner & form:

I bequeath & give to my dearly-beloved wife, Ann Sophia Walker, one-third of the whole of my personal estate, forever, for her own proper use and benefit, and also one-third of all my real estate
11 during her lifetime; and, in the event of her death, all the right in real property hereby bequeathed to her shall be, & is hereby, declared to be vested in my dear and infant son, James Walker.

I bequeath and give to my dear and affectionate mother, Dorcas Walker, forever, all of lot numbered seven, in square one hundred

& six, as laid down on the plan of the city of Washington, together with all the improvements thereon erected and appurtenances thereto belonging.

I bequeath & give to my dearly-beloved brother, John Walker, forever, all of lot numbered six, in square one hundred and six, with the two-story brick house back building and all appurtenances thereto belonging.

I bequeath & give to my dearly-beloved brother, Lewis Walker, forever, lots twenty-three, twenty-four, and twenty-five, in square numbered one hundred and six, together with a two-story brick building, with a basement story back building, and all ap-
12 purtenances thereto belonging and erected on one or more of said lots.

I bequeath & give to my dearly-beloved brother, Henry Walker, forever, lot numbered six, in square four hundred and three, together with the improvements thereon erected and appurtenances thereto belonging.

I bequeath & give to my dearly-beloved sister, Margaret Peck, lots numbered twenty-one, twenty-two, twenty-six, and twenty-seven, in square numbered one hundred & six, together with a two-story frame house erected on lot number twenty-seven, as her property forever.

I bequeath & give to my dearly-beloved sister, Louisa Ballard, forever, lot numbered four, in square (in square) numbered four hundred and thirty-two, together with the three-story brick house erected thereon and all the appurtenances thereto belonging.

I bequeath and give to my dearly-beloved sister, Sarah McCallion, part of lot numbered eight, in square numbered seventy-four, together with the frame house erected thereon, as her property forever.

13 I bequeath & give to my dear and infant son, James Walker, lot numbered twenty-two in square numbered three hundred & fifty-two, together with two two-story brick houses and other buildings thereto belonging, as his property forever.

I also bequeath & give to my infant son, James Walker, forever, the balance of my real estate believed to be & to consist in lots numbered six, eight, and nine, with a house, part brick and part frame, erected on one of said lots, in square one hundred & sixteen; lots thirty-one, thirty-two, & thirty-three in square numbered one hundred & forty, and a slaughter-house erected on one of said lots; lots numbered eight and eleven in square numbered two hundred & fifty; and lot numbered twenty-eight in square numbered one hundred and seven; and further, I bequeath & give to my infant son, James Walker, one thousand dollars, to be paid out of my personal estate to, and applied at the discretion of, his guardian hereinafter appointed for the education of my son, James Walker.

14 The balance of my personal estate, whatever it may be, I desire shall be equally divided between my mother, Dorcas Walker, my sister, Sarah McCallion, & my brothers, Jno., Lewis, & Henry Walker.

And now, in order to execute fully and faithfully this my last will & testament, I do hereby constitute & appoint George Cover, of the city of Washington, in the District of Columbia, as guardian to my son, James Walker, and, in so doing, hereby repose especial confidence in his integrity and faithfulness to the important and solemn duty hereby enjoined upon him.

And, lastly, I do hereby constitute and appoint Alexander McIntire, John Gadsby, Senior, and George Cover, all of the city of Washington, in the District of Columbia, as my executors, to execute fully and faithfully this my last will and testament, and, in so doing, I hereby declare that I rely upon them as honest, just, and upright men. Amen.

JAMES WALKER. [SEAL.]

15 Signed, sealed, published, pronounced, and declared by the said James Walker as his last will and testament, in the presence of us, who, in his presence and in the presence of each other, have hereunto subscribed our names, at the city of Washington, in the year of our Lord one thousand eight hundred and thirty-two, this seventeenth day of September.

Witnesses, for the want of more room, have signed on the next page.

In the presence of each other and in the presence of the testator, James Walker, the word "two" in the 27th line erased, and the word "three" above written inserted, and in the same line the word "twenty" erased, and also the words "thereon or" erased previous to the signing of this instrument in the 34th line, and the words "sixteenth day of June" on the 3d page erased, and the words "seventeenth day of September" —, all previous to signing.

Witnesses:

R. S. BRISCOE. [SEAL.]
WILLIAM WATERS.
LAZARE KERVAND.

16 After the reading of the said will the defendant's counsel admitted that the brothers and sisters of the devisor were named, as follows, Lewis, John, and Henry Walker; Louisa Ballard, Sarah McCallion, and Margaret Peck, all living at the time of his death. It was also admitted that said brothers and sisters were all named in said last will and testament, and that they were the only brothers and sisters of the testator, and that there were no other brother or sister of said testator living at the time of his said death. It was further admitted that the said testator died leaving a widow named Ann Sophia Walker, who afterwards intermarried with one George Parker; also an infant son, his only child, named James C. Walker, and his mother, Dorcas Walker, who afterwards became the guardian of the said Henry Walker, one of the testator's brothers aforesaid, and through whom the plaintiff claims, and who was a minor at the time of the death of the testator, and his youngest brother, and about eleven years old at that time.

17 The plaintiff thereupon offered evidence tending to show that the said testator was the owner of lot 3, in square 406, at the time of his death, and that said lot was then occupied by his tenants, and that thereafter his mother, the said Dorcas Walker, as the guardian for his minor brother, the said Henry Walker, continued for several years to collect in her capacity of guardian two-thirds of the rents of said premises, and the other third was collected for Mrs. Ann Sophia Parker, widow of the said testator; and that the rents were thus collected upon a claim under the said will.

The plaintiff then offered in evidence the record of the following deed from Henry Walker to Thomas Sewall, in liber W. B. 90, folio 89, *et seq.*, one of the land records of the District of Columbia:

Deed. Recorded February 4th, 1842.

HENRY WALKER to THOMAS SEWALL.

18 This indenture, made this twenty-ninth day of January, in the year of our Lord eighteen hundred and forty-two, between Henry Walker, of the city of Washington, in the District of Columbia, of the one part, and Thomas Sewall, of the city of Baltimore, in the State of Maryland, of the other part, witnesseth: That the said Henry Walker, for and in consideration of the sum of twenty-five hundred dollars, current money of the United States, to him in hand paid, at or before the sealing and delivery of these presents, by the said Thomas Sewall, the receipt of which is hereby acknowledged, hath given, granted, bargained, and sold, enfeoffed, conveyed, released, and confirmed, and by these presents doth give, grant, bargain, and sell, enfeoff, convey, release, and confirm, unto the said Thomas Sewall, his heirs and assigns, forever, lot numbered three (3), in square numbered four hundred and six (406), situate, lying, and being in the city of Washington, in the District of Columbia aforesaid, together with all the buildings, improvements, rights, privileges, appurtenances, and other hereditaments to the same belonging or

19 in any way or manner appertaining, and the remainders, reversions, rents, issues, and profits thereof, and all the right, title, and interest, at law and in equity, of him, the said Henry Walker, in and to the same. To have and to hold the said described lot of ground and premises with the appurtenances unto him, the said Thomas Sewall, his heirs and assigns, forever, to his and their sole use, benefit, and behoof forever. And the said Henry Walker, for himself and his heirs, executors, and administrators, by these presents covenants, promises, and agrees to and with the said Thomas Sewall, his heirs and assigns, that he is lawfully seized in fee of the said premises, and that he hath good right, full power, and lawful authority to sell and convey the same to the said Thomas Sewall in manner aforesaid; that the premises are free and clear of all encumbrances, and that he and his heirs will forever warrant and defend the same to him, the said Thomas Sewall, his heirs and assigns, forever, and against all persons and claims whatsoever.

20 In testimony whereof, the said Henry Walker hath here-

unto subscribed his name and affixed his seal, the day and year first hereinbefore written.

HENRY WALKER. [SEAL.]

Signed, sealed, and delivered in the presence of us—
GILBERT L. GIBERSON.
B. K. MORSELL.

DISTRICT OF COLUMBIA, }
Washington County, } *sct:*

We, Gilbert L. Giberson and Benjamin K. Morsell, justices of peace in and for the county and district aforesaid, do hereby certify that Henry Walker, party to a certain deed, bearing date on the twenty-ninth day of January, 1842, and hereto annexed, personally appeared before us, in our county aforesaid; the said Henry Walker, being personally well known to us as the person who executed the said deed, acknowledged the same to be his act and deed.

Given under our hands and seals, this twenty-ninth day of
21 January, 1842.

GILBERT L. GIBERSON, *J. Peace.* [L. S.]
B. K. MORSELL, *J. Peace.* [L. S.]

The plaintiff thereupon offered evidence tending to show that Thomas Sewall, grantee in said deed, and after the execution thereof, collected two-thirds of the rents of the said premises, and Ann Sophia continued to collect one-third thereof.

The plaintiff then offered in evidence the record of the following deed from Thomas Sewall to John Brereton, in liber J. A. S. 28, folio 209, *et seq.*, one of the land records of the District of Columbia; and also offered evidence tending to prove that Mrs. Ann Sophia Parker, by her agents and attorneys, continued to collect one-third of the rent, and the residue was collected by Walter C. Brisco from 1851 to 1854. Said deed is as follows:

22 *Deed. Recorded July* 26, 1851.

THOMAS SEWALL *et ux.* to JOHN BRERETON.

This indenture, made this the fifth day of February, in the year of our Lord one thousand eight hundred and fifty-one, between Thomas Sewall and Elizabeth, his wife, of the city of Baltimore, in the State of Maryland, of the one part, and John Brereton, of the city of Washington, in the District of Columbia, of the other part, witnesseth: That the said Thomas Sewall and Elizabeth, his wife, for and in consideration of the sum of one thousand dollars, to them in hand paid by the said John Brereton at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have given, granted, bargained, and sold, remised, released, and forever quit-claimed, and do by these presents give, grant, bargain, and sell, remise, release, and forever quit-claim, unto the said John
23 Brereton, his heirs and assigns, forever, all that certain piece of ground in the city of Washington, in the District of Colum-

bia, and known and described as lot No. three (3), in square No. four hundred and six (406), the said lot having been conveyed to said Thomas Sewall by Henry Walker by deed bearing date on the 29th day of January, A. D. 1842, and recorded among the land records of Washington county, in liber W. B. No. 90, folio 90, together with all the rights, privileges, and appurtenances to the same belonging or in any manner appertaining, and all the estate, right, title, interest, claim, and demand either at law or in equity or otherwise however of them, the said Thomas Sewall and Elizabeth, his wife, or either of them, in, to, or out of the said piece of ground or any part thereof. To have and to hold the said piece of ground and the appurtenances unto the said John Brereton, his heirs and assigns, to his and their sole use, benefit, and behoof, forever.

In testimony whereof, the said Thomas Sewall and Elizabeth, his wife, who hereby relinquished all her right and claim to dower in the said piece of ground, have hereunto set their hands and seals on the day and year first before written.

THOMAS SEWALL. [SEAL.]
ELIZABETH SEWALL. [SEAL.]

Signed, sealed, & delivered in the presence thereof—
JOHN I. SNYDER.
HENRY F. FRIESE.

STATE OF MARYLAND, }
City of Baltimore, } *sct:*

We, the undersigned, justices of the peace in and for the city aforesaid, in the State aforesaid, do hereby certify that Thomas Sewall, a party to a certain deed bearing date on the fifth day of February, A. D. 1851, and hereto annexed, personally appeared before us in our city aforesaid the said Thomas Sewall, being personally well known to us as the person who executed the said deed, and he then and there acknowledged the same to be his act and deed; and also at the same time and place Elizabeth, the wife of the said Thomas Sewall, also a party to the said deed, personally appeared before us, the said Elizabeth being personally well known to us as the person who executed the said deed, and being by us examined privily and apart from her said husband, and having the said deed fully explained to her, she then and there acknowledged the same to be her act and deed, and declared she had willingly and of her own free will signed, sealed, and delivered the same, and that she wished not to retract it.

Given under our hands and seals, this the fifth of February, A. D. 1851.

JOHN I. SNYDER.
HENRY F. FRIESE.

STATE OF MARYLAND, }
Baltimore County, } *sct:*

I hereby certify that John J. Snyder and Henry F. Friese, Esquires, before whom the annexed acknowledgments were made and who

have thereto subscribed their names, were at the time of so
26 doing justices of the peace of the State of Maryland, in and for the city of Baltimore, duly commissioned and sworn.

In testimony whereof I hereto set my hand and affix the seal of Baltimore county court, this fifth day of February, A. D. 1851.

[SEAL.] A. W. BRADFORD,
Clerk Baltimore County Court.

The plaintiff then offered the record of the following deed from the heirs of John Brereton to John Patch, in Liber 732, fol. 339, *et seq.*, one of the land records of the District of Columbia, having first offered evidence tending to show that the grantors therein were the only heirs at law of the said Brereton. Said deed is as follows:

Deed.

Recorded January 14th, A. D. 1874, 11 a. m.

ELIZA A. DRANE *et al.* to JOHN PATCH.

This indenture, made this eighth day of December, in the
27 year eighteen hundred and seventy-three, between Eliza A. Drane, Mary A. Parsons, Elizabeth Brereton, Ellen Brereton, Annie Brereton John Brereton, and Flora Brereton, of the first part, and John Patch, of the second part, all of the city of Washington, in the District of Columbia, witnesseth that the said parties of the first part, for and in consideration of the sum of seven hundred dollars, lawful money of the United States, to them in hand paid by the said party of the second part, at or before the sealing and delivery of the[se] presents, the receipt of which is hereby acknowledged, and of further valuable consideration to them satisfactorily secured, have given, granted, bargained, and sold, aliened, released, enfeoffed, and confirmed, and do by these presents give, grant, bargain, and sell, alien, release, enfeoff, and confirm unto the said party of the second part, his heirs and assigns, all that piece or parcel of land and premises situate, lying, and being in the city of Washington and District of Columbia aforesaid, and marked, laid down, and distinguished on the plat and ground plan of said city, a lot
28 numbered three (3), in square numbered four hundred and six (406), together with all and singular the ways, easements, buildings, improvements, rights, privileges, and appurtenances to the same belonging or in anywise appertaining to and all the rights, estate, and interest of the said parties of the first part, at law or in equity, in and to the same.

To have and to hold the hereinbefore described lot of land and premises, with the appurtenances, to him, the said party of the second part, his heirs and assigns, to his and their proper use for ever.

And the said parties of the first part for themselves, their heirs, executors, administrators, and assigns, covenant and agree to and with the said party of the second part, his heirs and assigns, that they, the said parties of the first part, their heirs and assigns, shall and will at all times hereafter, at the request and proper charges of

the said party of the second part, his heirs and assigns, make, execute, deliver, and acknowledge all such further deeds and
29 assurance in law as may be necessary or proper more fully to convey and confirm to the said party of the second part, his heirs and assigns, the piece or parcel of land hereby intended to be conveyed.

In testimony whereof, the said parties of the — — have set their hands and seals the day and year first hereinbefore written.

ELIZA A. DRANE.	[SEAL.]
M. A. PARSONS.	[SEAL.]
ELIZABETH BRERETON.	[SEAL.]
ELLEN BRERETON.	[SEAL.]
ANNIE BRERETON.	[SEAL.]
JOHN BRERETON.	[SEAL.]
FLORA BRERETON.	[SEAL.]

Signed, sealed, and delivered in presence of—
SAM'L C. MILLS.

DISTRICT OF COLUMBIA, *County of Washington:*

I, Sam'l C. Mills, a notary public in and for said county of Washington, in the District of Columbia, duly commissioned and
30 qualified, do hereby certify that Eliza A. Drane, Mary A. Parsons, Elizabeth Brereton, Ellen Brereton, Annie Brereton, John Brereton, and Flora Brereton, parties to a certain deed hereto annexed, bearing date the eighth day of December, in the year eighteen hundred and seventy-three, and who are personally well known to me to be the persons who executed the same, personally appeared before me in my said county and acknowledged the same to be their act and deed, and the said Eliza A. Drane and Mary A. Parsons being by me examined privily and apart from their husbands, and having the said deed fully explained to them, they, the said Eliza A. Drane and Mary A. Parsons, each for herself, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Witness my hand and seal this eighth day of December, in the year eighteen hundred and seventy-three.

[SEAL.] SAM'L C. MILLS,
Notary Public.

31 The plaintiff then gave evidence tending to show that the testator had no title to lot 6, in square 403, at the time of making his will, or at the time of his death, and never had any title or claim thereto, and also gave evidence tending to show that he did own lot 3, in sq. 406, and that the fee-simple title thereto was in him at the time of making said will, and at the time of his death; also that said lot 3, in sq. 406, was located on E street N. W., between 8th and 9th Sts., and was, at the time of making of the said will, and at the time of the death of the said testator, improved by having thereon a dwelling-house, and that lot 6, in sqr. 403, was located on

9th street, between I and K streets, and was unimproved at the time said will was made, and at the time of the death of the said testator.

The foregoing is the substance and tendency of all the testimony on the part of the plaintiff.

All the evidence above set forth, except the will, was ob-
32 jected to by the defendant's counsel; the parol testimony being objected to on the ground that it was inadmissable for the purpose of altering, changing, or explaining the said will, and the various deeds being objected to for matters appearing upon the face thereof, but were admitted by the court, subject to said objections, the court observing that he would consider all of said objections at the close of the plaintiff's case, when the whole of plaintiff's title could be passed upon, as far as the law was concerned, at the same time.

The admissions herein set forth were made by defendant's counsel to save time, and with the understanding that they should have the same benefit of their objections to the admissability of the said evidence as though specifically set forth in regard to each and every item thereof.

The plaintiff having closed his case, the defendant's counsel asked the court to rule that, upon the evidence submitted, subject
33 to the objection of defendant's counsel, as above, the plaintiff is not entitled to recover, and the court ruled that the parol evidence was inadmissible to explain or alter the said will, and that the plaintiff was not entitled to recover, and instructed the jury to find a verdict for the defendant, to which ruling and instruction the plaintiff, by his counsel, then and there excepted, and prayed the court to sign and seal this bill of exceptions, which is accordingly done this 18th day of March, 1881.

ARTHUR MACARTHUR, *Justice.* [SEAL.]

Proceedings in General Term.

MONDAY, *January* 23, 1882.

Proceedings before the Supreme Court of the District of Columbia, beginning on the fourth Monday of January, 1882, in pursuance of the orders of the court of the 19th of December, 1881, *ante* page 199.

Present: Chief Justice Cartter and Justices Hagner and James.

34 * * * * * * *

THURSDAY, *March* 2, 1882.

Session resumed, pursuant to adjournment. Present: Chief Justice Cartter and Justices Hagner and James.

JOHN PATCH, Plaintiff,
vs.
ELIAS E. WHITE, Defendant. } At Law. No. 20463. Cal. 32.

Mr. Merrick, for plaintiff, resumes and concludes his argument, commenced yesterday. Submitted.

* * * * * *

MONDAY, *April 17th*, 1882.

Session resumed, pursuant to adjournment. Present: Chief Justice Cartter and Justices Hagner, Cox, and James.

* * * * * * *

JOHN PATCH, Plaintiff,
vs.
ELIAS E. WHITE, Defendant. } At Law. No. 20463. Cal. 32.

Now again come here the plaintiff and defendant, by their respective attorneys; and thereupon, because it appears to the court here that there is no error in the record and proceedings, or in the
35 judgment of the special term, therefore it is considered that the said judgment be, and the same is hereby, affirmed, with costs, the plaintiff's motion for a new trial upon exceptions notwithstanding. Chief justice dissenting.

36 In the Supreme Court of the District of Columbia, the —— day of ——, 18—.

JOHN PATCH
vs.
ELIAS E. WHITE. } At Law. No. 20463. In Error.

Know all men by these presents, that we, John Patch, as principal, and John Hoover, as surety, are bound unto the above-named Elias E. White in the sum of two hundred and fifty dollars, to be paid to the said Elias E. White, his executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this 3rd day of October, 1882.

Whereas the above-named John Patch has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named John Patch shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

(Signed) JOHN PATCH. [SEAL.]
JOHN HOOVER. [SEAL.]

Sealed and delivered in presence of—
MARCIA A. PATCH.

Approved Oct. 4, 1882.

D. K. CARTTER,
Chief Justice, &c.

37 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between John Patch, plaintiff, and Elias E. White, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: Therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 4 day of October, in the year of our Lord 1882, and of the Independence of the United States the 106th.

[SEAL.] R. J. MEIGS, *Clerk S. C. D. C.*,
By R. J. MEIGS, JR., *As't.*

DISTRICT OF COLUMBIA, *to wit:*

TO ELIAS E. WHITE:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein John Patch is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice may be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

D. K. CARTTER, *Ch'f Just.*

Service acknowledged.

Oct. 7, '82. GORDON & GORDON,
Att'ys for E. E. White.

38 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, Return J. Meigs, clerk of the said court, do hereby certify that

the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court, this 5th day of October, 1882.

[SEAL.] R. J. MEIGS, *Clerk*,
By J. R. YOUNG, *Assistant Clerk*.

Justice's Certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by Return J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal, this 5th day of October, 1882.

D. K. CARTTER, *Chief Justice*. [SEAL.]

Clerk's Certificate to Justice's Official Character.

I, Return J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court, this 5th day of October, 1882.

[SEAL.] R. J. MEIGS, *Clerk*,
By J. R. YOUNG, *Assistant Clerk*.

Endorsed on cover: District of Columbia sup. court. No. 324. John Patch, plaintiff in error, *vs.* Elias E. White. Filed 7th October, 1882.

117-210

FILED
OCT 29 1885
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM 1885.

JOHN PATCH, *Plaintiff in Error*,
vs.
ELIAS E. WHITE.
} No. 58.

BRIEF FOR PLAINTIFF IN ERROR.

This cause comes up by writ of error to the Supreme Court of the District of Columbia.

The action was ejectment. The plaintiff here was plaintiff below.

On the trial the plaintiff claimed title from a devisee under a will, and offered parol evidence to ascertain the subject of the devise, which was imperfectly described, and also parol evidence to prove possession under the will by the devisee and his grantees. The court ruled that such evidence was inadmissible, rejected it, and directed the jury to find for the defendant, who had offered no evidence.

The questions raised on the record are as to the correctness of that ruling and direction.

THE CASE.

The plaintiff sued to recover two undivided third parts of lot numbered 3 in square 406 in the City of Washington.

He derived title from James Walker, and offered in

evidence the will of James Walker, dated September 17, 1832, by which the testator after devising one-third of all his real estate to his wife for life, gave to each of his brothers and sisters a parcel of improved real estate, and among others to his "dearly beloved brother, Henry Walker, forever, lot numbered 6 in square 403, together with the improvements thereon erected and appurtenances thereto belonging." (Rec. p. 12.)

1. Parol evidence that the testator never at any time had any title or claim to lot 6, in square 403, and that said lot had no improvements whatever on it. (Rec. p. 31).

2. Also that the testator, at the time of making his said will, and at the time of his death did own in fee simple and was in possession of lot 3 in square 406, and that said lot was improved by a dwelling house erected thereon and occupied by a tenant.

3. Also that the guardian of Henry Walker, the devisee, who was eleven years old, after the testator's death, collected the rents for her ward, claiming under the will.

4. That the devisees named in the will as his brothers and sisters and to each of whom he had devised a parcel of improved property comprised all his brothers and sisters.

The plaintiff then deraigned title from Henry Walker, one of the devisees and offered evidence of his possession and that of his grantees.

5. The parol evidence when offered was objected to as "inadmissible for the purpose of altering, changing or explaining the said will." (Rec. p. 32.) The court admitted it subject to the defendant's objections. When the plaintiff's evidence was all in, "the defendant's counsel asked the court to rule that upon the evidence sub-

mitted, subject to the objection of defendant's counsel, as above, the plaintiff is not entitled to recover; and the court ruled that the parol evidence was inadmissible to explain or alter the said will, and that the plaintiff was not entitled to recover, and instructed the jury to find a verdict for the defendant." (Rec. p. 32, 33), verdict; exception judgment; motion for new trial; appeal, judgment affirmed. (Rec. p. 7, 8, 9, 33, 34)

ASSIGNMENT OF ERROR.

The court erred in excluding the parol evidence offered, to identify the subject of the devise, and to prove the possession under it.

POINTS.

The parol evidence was competent evidence, and should have been admitted. It was offered "to identify the * * thing intended by the testator,"—to identify the thing devised to Henry Walker in the will.

This court (in Blake *vs.* Hawkins, 98 U. S. 324) said that the circumstances of the testator, the condition of his family the amount and character of his property should be taken into consideration. "The interpreter may place himself in the position occupied by the testator when he made the will, and from that standpoint discover what was intended."

On this subject Wigram, in a work of recognized authority lays down the following rule.

"For the purpose of determining the object of a testator's bounty, or the subject of the disposition or the quantity of interest intended to be given by his will, a court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the sub-

ject of disposition, and to the circumstances of the testator and of his family and affairs, for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will. The same (it is conceived) is true of every other disputed point respecting which it can be shown that a knowledge of extrinsic facts can in any way be made ancillary to the right interpretation of the testator's words."

In Hiscocks *vs.* Hiscocks, 5 M. & W., 363, the question was whether the declarations of a testator made after the execution of the will could be received to determine whether Simon H. or John H. was the object of the devise.

Lord Abinger introduced a review of the cases thus:

"The object in all cases is to discover the intention of the testator. The first and most obvious mode of doing this is to read his will as he has written it, and collect the intention from his words; but as his words refer to facts and circumstances respecting his property and his family, and others whom he names and describes in his will, it is evident that the meaning and application of his words can not be ascertained without evidence of all those facts and circumstances. To understand the meaning of any writer, we must first be apprised of the persons and circumstances that are the subjects of his allusions or statements; and if these are not fully disclosed in his work we must look for illustration to the history of the times in which he wrote and to the works of contemporaneous authors. All the facts and circumstances, therefore, respecting the person or property to which the will relates, are undoubtedly legitimate and often necessary evidence to enable us to understand the meaning and application of his words."

The C. B. then says: Evidence may be given of habits of the testator as to the use of certain words and names. He then refers to "another mode of ob-

taining the intention of the testator which is by evidence of his declarations, or the instructions given for his will and other circumstances of a like nature" and for this sort of evidence he thinks but one case exists, that is, where two or more persons exist, "each answering the words in the will," and continues.

"It appears to us that in all other cases parol evidence of what was the testator's intention, ought to be excluded upon this plain ground that his will ought to be made in writing; and if his intention can not be made to appear by the writing explained by circumstances there is no will."

On this subject Jarman says:

"Though it is (as we have seen) the will itself (and not the intention as elsewhere collected) which constitutes the real and only subject to be expounded, yet in performing this office a court of construction is not bound to shut its eyes to the state of facts under which the will was made; on the contrary an investigation of such facts often materially aids in elucidating the scheme of disposition which occupied the mind of the testator. To this end it is obviously essential that the judicial expositor should place himself as fully as possible in the situation of the person whose language he has to interpret, and guided by the light thus thrown on the testamentary scheme, he may find himself justified in departing from a strict construction of the testators language without (to borrow the words of an elegant writer), allowing conjectural interpretation to usurp the place of judicial exposition (Wigram 2d ed., p. 75). Thus if it appears (and of course it can only appear by extrinsic evidence) that there is no subject or object answering to the description in the will, but that there is a subject or object precisely answering to such description interpreted according to the popular and less appropriate sense of

the words the conclusion that the testator employed them in the latter sense is irresistible. Examples of this principle of construction are widely scattered through the present treatise."

Jarman on Wills; p. 363.

"It is clearly not essential to the validity of a devise that in all the particulars which the testator has included in his description of the subject or object of the gift should be accurate. *There need only be enough of correspondence to afford the means of identifying both.*" (Ib. p. 329).

There is a distinction between evidence from which the intention may be inferred, and direct evidence of intention. "In the one case, the testimony is received to show the specific fact of the testator's intention by extrinsic evidence; in the other it is received merely in aid of the construction." (Redfield, p. 593).

II.

Among the cases in support or illustration of these rules are the following:

Halstead *es.* Searle, 1 Ld. Raym, 728.

Devise of lands at Bramstead in Surrey, occupied by John Ashley—testator had none such—held to pass land, at Bramstead, in Hants, occupied by John Ashley. On which Jarman remarks that "without the reference to the occupancy, however, in this instance the description would have been sufficient for the misnomer of the county in which the parish is situated produces no uncertainty, *unless* the testator should happen to have property answering to the description in a parish of that name in more than one county." (Ib. 329).

Pacy *es.* Knollys. Brownlow 131.

Devise of houses and lands lying in the parish of Billing, and in a street called Brook street; the testator had no lands in the parish of Billing, or in Brook street; held a good devise of lands in Billing street.

Doe. dem. Wilkins *vs.* Kerney, 9 East, 366.

Devise of leasehold estates in a certain locality; testator had none, but had freehold estates there; held a good devise of the freehold.

Doe. dem. Humphreys *vs.* Roberts, 5 B. & Ald., 407.

Devise of dwelling and other houses in High street; testator had none but the dwelling in that street, but had some other in a lane contiguous thereto; held a good devise of houses in the lane.

Bayly J. "What other buildings are there in High street to satisfy the will in this case?"

Abbott J. "In fact he had no premises in that street, except the principal messuage, unless these cottages are to be considered as coming within the description."

Bayly J. "If the description is precise and there are premises to satisfy it, and there are other premises also, then the others will not pass. If, however, the description is not precise, and if you can not satisfy the will unless additional property passes besides that which is described, then you must presume that the testator intended to pass that property and that his description is inaccurate."

Holroyd J., after stating how the cottages answered the description, adds, "and as there is no other property to satisfy the will, I am of opinion that the property ought to pass." So held.

Selwood vs. Mildmay, 3 *Ves.* 396. Bequest of 4 p.c. Bank annuities: had none: held to pass 4 p.c. Long annuities:

Door vs. Geary, 1 *Ves. Sr.*, 255. Bequest of £700 East India Stock: had none: held to pass £700 Bank Stock.

Lord Hardwicke: "In the construction of wills the testator must be held to mean something if it can."

see Marshall - Marshall 1 Atkins 461

Dobson vs. Waterman, 3 *Ves.*, 308. Bequest of £700 Capital Stock in the 3 p.c. consolidated Bank annuities standing in testator's name in the Bank of England: had no stock of any kind at the bank: had £1500, 3 p.c. South Sea annuities—held to pass £700 of these. Lord Kenyon: "the state of the testator's property made it manifest that he was under a mistake as to the particular stock, &c."

Pentecost vs. Ley, 2 *Jac.* & *W.* 207. Bequest of £1000 long annuities "now standing in my name or in trust for me." Had none: had £1000 3 p.c. reduced annuities: held to pass them, Chief Baron: "It being clear that she intended to give something, we must try as well as we can to make out what it was. Now she had, at the date of her will, a sum of £1000 3 p.c. reduced annuities, and having nothing to answer the description so nearly as that sum, it being clearly a mistake, it seems to me that we are obliged to consider that when she *said* £1000 long annuities, she meant these reduced annuities."

Gallini *vs.* Noble, 3 Merivale, 691. Bequest of all his money in the Bank of England: had none; held to pass 3 p.c. and 4 p.c. bank annuities.

Quennell *vs.* Turner, 13 Beavan, 240. Testator charged a sum upon "moneys standing in my name in the public funds:" had none standing in his name, but had a partial interest in moneys standing in the name of a trustee: held to pass these.

In Moseley *vs.* Massey, 8 East., 149, testator gave

his fee in Radnor to A, and his reversion in Monmouth to B. His fee was in Monmouth and his reversion in Radnor. "It was held that comparing the devising clause with the recital *and the facts*, sufficient appeared to ascertain beyond a doubt that the *devisor had made a mistake* in the local description, and that *his intent was* to pass the present interest of his estate in fee in possession which was in the County of Monmouth, and the reversion of his settled estate in the County of Radnor, although he had respectively *misdescribed their local situations*." (Jarman p. 441).

Newton *vs.* Lucas, 6 Sim. 54.

Testatrix devised all her messuages situate in Denmark Court. She had five houses in that court and another which abutted on it. Evidence being given of the exact position of the last mentioned house which was claimed under the devise with the other five, the Vice-Chancellor having noticed a supposed case proceeds: "But that is not the question before me; because if this testatrix had not had the five houses in Denmark Court, and had devised her messuage in Denmark Court, there is sufficient evidence in the case to allow the house No. 383 to pass. But it is quite plain that No. 383 was not situated in Denmark Court, and as she has houses which would satisfy the description which she has used, the house 383 cannot be held to have passed by the words, "my freehold messuage in Denmark Court."

Doe. dem. Browne *vs.* Greening, 3 Man. and Sel. 171.

A devise of all estate and interest whatever * * at Coscomb. Evidence was offered that another estate not at Coscomb was formerly united with and enjoyed with that at Coscomb and should be held to pass with it. The judge rejected the evidence being of the opin-

ion that as it appeared that the testator had land at Coscomb which was sufficient to satisfy the devise, the evidence was not admissible.

In Doe *ex.* Allcock, 1 B., and Ald. 137. Devise of lands to several for life, etc., Lord Ellenborough C. J. "The the testator has thrown together a heap of words the sense and meaning of which he did not clearly apprehend, but although the language of this will is confused and the words are scattered in such a way as if taken in the order in which they stand they do not convey any meaning, yet in favor of common sense we may take the liberty of transposing them according to that order which we may fairly suppose the testator would wish to have adopted, and by which we can best effectuate his intention.

In Miller *ex.* Travers, 8 Bing., 244, a testator had devised all his lands in the County of Limerick and City of Limerick—the city being in the county, and he had none in the county outside of the city. It was proposed to prove that he had instructed the scrivener to devise lands in the County of *Clare*, and City of Limerick, the court held that as there were lands to answer the description of the will—in the County of Limerick, and in the City of Limerick; the evidence could not be received. The court said that wherever a difficulty arose in applying the words of a will to the thing which is the subject-matter of a devise, parole evidence may be admitted to remove an ambiguity produced by extrinsic evidence, but here was no ambiguity.

III.

Jarman says: "The same principles of construction [applicable to the object] of course apply to the subject of the gift. It is sufficient, therefore, that the devisee or legatee is so designated as to be distinguished from every other person, and the inaptitude of

some of the particulars introduced into the testator's description is immaterial."

Pitcairne *vs.* Brase, Finch, 403. Devise to William, eldest son of P.: no William: Andrew, the eldest son held entitled.

Dowsett *vs.* Sweet, Amb. 175. Bequest to John and Benedict, sons of J. S.: no John: James held entitled.

Parsons *vs.* Parsons, 1 Ves. Jr. 266. Testator gave annuity to his brother Edward, and after his death, to his children by his present wife. Brother Edward and wife dead. Brother Samuel and wife living; Samuel held entitled.

Smith *vs.* Coney, 6 Ves., 42, bequest to Rev. Charles Smith of S. I. Clerk, no such person, Richard Smith held entitled.

Garth vs. Meyrick, 1 *Bro. C. C.* 30. Bequest to six grandchildren, four named and a fifth Ann named twice; the sixth, Elizabeth omitted, but held entitled to the share mistakenly given to Ann by the repetition of the name.

Stockdale vs. Bushby, G. Coop. 229. Bequest by Thomas Stockdale to his namesake Thomas S. second son of John S.; John's second son was not named Thomas, but held entitled.

Doe *vs.* Danvers, 7 East, 299. Devise to Mary Cook, wife of ——— Cook—Elizabeth Cook held entitled on evidence that she was the only relative of the name of Cook and was a married woman, and was the person intended.

Doe *vs.* Huthwaite, 3 B. & A., 632. Devise to Stokeham Huthwaite, second son of John, and in default of issue to John, third son of said John. In fact John was second son, and Stokeham third son. The court left it to the jury to determine whether the mistake was in the name or in the description.

Hampshire *ex.* Pierce, 2 Ves. Sr. 218. Testator made his nephew, Robert Nune, his executor; no such person; and his nephew Robert New held entitled.

Beaumont *ex.* Fell, 2 P. Wms., 141. Bequest to Catharine Earnley; no such person; Gertrude Yardley held entitled. This case has been much criticized, but was declared by Lord Abinger in Hiscocks *ex.* Hiscocks, to "be reconciled with true principles upon this ground, that there was no such person as Catharine Earnley, and that the testator was accustomed to address Gertrude Yardley by the name of Gatty. This and other circumstances of the like nature which were equally admissible may perhaps be considered to warrant that desision. But then the evidence of the testator's declarations as to his intention of providing for Gertrude Yardley was also received, and the same evidence was received at *Nisi Prius* in Thomas *ex.* Thomas, 6, T. R., 671, and approved on a motion for new trial by the *dicta* of Lord Kenyon and Mr. Justice Lawrence."

In Thomas *ex.* Thomas, 6 T. R., 671–8, it was held that declarations of the testator, made before the execution of the will, could not be received, but that contemporaneous declarations should be.

In *Doe. d.* Allen *ex.* Allen, 12 Ad. and El., 451, declarations made after the execution of the will were received.

Bradwin *ex.* Harper, Ambler 374, A. D., 1759.

Testatrix bequeathed personal estate for life to her niece Mary Bradwin and at her death, "one moiety * * to be paid to the said Mary Bradwins' grandchildren, the children of her daughter Mary at the age of 21 and the other moiety to be paid to Annie the daughter of the said niece, Mary Bradwin."

Bill brought by Mary, daughter of Mary Bradwin

for her moiety; she was unmarried and had no children, and Annie was dead, leaving children. It was proved that when she made her will she lived in Derbyshire, and that Mary Bradwin her niece and her family lived at St. Alban's in Hertfordshire, and that the testatrix had never seen her niece's children or grand-children. His honor the master of the rolls "was satisfied of the mistake and of the power of the court to set it right by decreeing according to the intention but doubted at first whether he could do so for want of parties" but finally "decreed the money to be paid."

IV.

The American Cases show the same liberality in the admission of evidence.

Buttons Ex. v. Am. Tract Soc. 23 Pa St 336,

In ~~the Missionary Society's appeal, 30 Penna St. 425~~, a bequest had been made to the American Home Mission Tract Society for our ~~Foreign~~ Western Missions. There was no such society. Two claimants appeared; the American Tract Society, and the American Home Missionary Society. Evidence was admitted to show that the testator took most interest in the former, and had expressed a preference for it, and it was held entitled.

In the Trustees *vs.* Peaslee, 15 N. H., 317, there was a devise to the Franklin Seminary of Literature and Science: there was no such society, and it was awarded to the South Newmarket Methodist Seminary.

Clark *vs* Atkins, 90 No. Car, 629. Bequest of Bank stock in Citizens National Bank and Merchants & Farmers National Bank. Testatrix had no stock in the Citizens National Bank; but had railroad and state bonds deposited there. The bonds were held to pass by the will, the court said "she had no stock in the Citizens National Bank, but she manifestly intended to

bequeath something; what was it? The bonds were the only things she had in the bank and the inference is irresistible that they were the things which by a misdescription she called the bank stock."

In Rathbone *vs.* Dyckman, 3 Paige, 26—Chancellor Walworth said: "It was said by Sir William Jones, more than two hundred years since, that a case upon a will had no brother, and therefore that authorities in point in such cases could not be expected."

In Merrick *vs.* Merrick, 37 Ohio State 127, the testator devised the E. ½ S. E. ¼ of Section 28 in township 1, Range 3, E. to A. R. M.: did not own it: owned N. E. ¼. The court: "The inquiry then is whether the description in the third item, is referable to the fact that the testator must have supposed he had a devisable interest in the premises there described, or whether the mistake claimed, that is the use of the word south, when north was intended, was really made. *Which is the more reasonable supposition?*" The word "south" rejected and devise held good for the N. E. quarter.

In the Orphan Asylum *vs.* Emmons, 3 Brad., 144, a bequest of "stock in Mechanics Bank," when testatrix had no such stock, was held to pass stock in the City Bank—which she did own.

In Moreland *vs.* Brady, 8 Oregon, 303, a devise of lots 1 and 2 which testator did not own, was held to pass lots 3 and 4 which he did own.

In Allen *vs.* Lyons, 2 Wash., 477 Mr. Justice Washington said "the ambiguity in T. C.'s will is latent and may be explained by parole evidence. It does not appear that he had any house on Third street, but he had one on Fourth street, and that was in the occupation of R. H. If the jury are satisfied that this

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Cleveland *vs.* Spilman, 25 Ind. 95., The Court: "To say he intended to dispose of land to which he made no claim and had no title whatever would be absurd and cannot be thought of."

was the house intended * * then the verdict ought to be for the plaintiff."

Ex parte Hornby, 2 Bradford, ~~210~~ 420. Bequest to "my nephew James Hornby, son of my brother Frederick." Brother Frederick had no son James, but brother James had a son Frederick. The scrivener testified that the instructions were for a bequest to James' son Frederick. The surrogate: "Aside of the proof offered of the intentions of the testator in the present instance, the principle that in construing a will, words may be transposed to effectuate the testator's intention as gathered from the will and from existing facts proved extrinsically, comes in aid of the bequest now under consideration." [Cases cited]. The right to transpose where, from evidence, it appears that the clause of the will, as it stands, is inapplicable to an existing state of facts, but if transposed will be consistent and applicable, is sustained by these cases." Decreed accordingly.

V.

Redfield, in his ninth chapter on the construction of wills, says, "There is no more clearly established rule of construction, as applicable to wills, than that words or clauses of sentences, or even whole paragraphs, may be transposed to any extent, with a view to show the intention of the testator." This, he says in a note, it may seem, to the inexperienced, would be attended with difficulty. "But when it is remembered that the transposition must give effect to every part of the instrument, and must clearly tend to explain and remove uncertainties, there will not be much difficulty in the application of the rule. It will commonly produce such an obvious and unquestionable change in the clearness and simplicity of the will as to leave no room for doubt in the mind of any disinterested observer." (Sec. 15, p. 432).

Farley v Kerr 3 Bst 346-382
Smith v Bell 6 Pet 68-78

But even rejecting the erroneous figures 3 and 6, there is enough left to identify the property intended. The square in which it lies is indicated by three figures 4, 0, 6, four in the hundred, nought in the ten, and six in the unite place—the last being expunged, there remains the four hundreds, and no [redacted] tens—and in this row of squares 406 was the only square the testator had any property in, and lot 3 the only lot he owned in that square.

The squares in Washington are so numbered that the different hundreds constitute so many different blocks, and if we know the figure that marks the hundreds, and the figure that marks the tens, we can with perfect certainty declare the property described to be one of a given ten—in this case one of the first ten following 400. In that ten there was but one square 406 in which the testator had property, and lot 3 was that property.

The scheme of the will is remarkably methodical and perspicuous.

The testator declares his general intention to dispose of the estate with which it has pleased God to bless him, and proceeds to do so by giving his wife one-third of everything—of the personal estate absolutely, and of the real estate for life.

He then gives his brothers and sisters, each, a parcel of improved real estate.

He then gives his son and only child several parcels of improved real estate.

He then gives his son, in another devise, the residue of his real estate, which he schedules and describes.

The real estate devised, including the residue, being all described by lots and squares, the will purports to contain a schedule of all that the testator owned; and

lot 3 in square 406, which he did own, is not otherwise described than as lot 6 in square 403.

The residuary clause purports to give a schedule of all his property which the testator had not disposed of; it does not contain lot 3 in square 406; and it consequently asserts, by implication, that lot 3 in square 406 had been devised in a previous clause, and if so, then it was devised by the description of lot 6 in square 403.

"He could not have intended to devise land to which he never had any title; he must have intended to devise lands which did belong to him." (Redf. Am. Ca. p. 544). "The law presumes he intended to devise lands which he did own." (Ib. p. 546).

He could not have intended to purchase the lands described in the devise, and thus satisfy the words of the will, because in this jurisdiction after acquired property does not pass.

And, moreover, in the preamble, the testator expressed his intention to dispose only of the real estate he then had: "the estate wherewith it has pleased God to bless me."

Read, as defendant contends the will should be read, the testator has failed in his expressed intentions. He has not confined himself to disposing of the estate which he possessed, but has undertaken to dispose of property which he did not possess; he has not disposed of all the property he possessed, but left undisposed of a parcel which was yielding him revenue, and must have been in his mind; he has not left his dearly beloved brother a parcel of improved property, but has perpetrated on a little boy a ghastly joke parallelled only by the grim death scene in Irving's story of Buckthorne, where the dying uncle raised his nephew's expectations of a fortune and

chuckles over the disappointment his devisee will experience when he finds it a bubble; with this difference, however, that in this case the boy was too young either to appreciate the humor of the joke, or to experience the sting of the disappointment. All this is impossible, and as Ch. J. Fraser, of Indiana, said it "is not to be thought of." But reverse the position of the figures 3 and 6 "in the light of common sense," and the devise is clear, intelligible, and reasonable; the good faith of the testator is vindicated, his memory is cleared of imputation of a heartless trick upon a child, and the declared and manifest intention of the will is established and carried into effect.

CONCLUSION.

It is submitted that the judgment should be reversed, and the cause remanded with directions to award a new trial.

JOHN D. McPHERSON,
CALDERON CARLISLE,
for Pliff. in error.

117-24

FILED.
JAN 4 1886
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM 1885.

REHEARING.

JOHN PATCH, *Plaintiff in Error*,
vs.
ELIAS E. WHITE, *Defendant in Error*.
} No. 58.

JOHN D. McPHERSON,
CALDERON CARLISLE,
Counsel for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1885.

JOHN PATCH, *Plaintiff in Error*,
vs.
ELIAS E. WHITE. } No. 58.

Rehearing.

BRIEF FOR THE PLAINTIFF IN ERROR

This was an action of ejectment, brought by the plaintiff in error, who claims title through the will of James Walker, under a devise to his youngest brother, Henry Walker; and the case turns upon the determination of the subject of disposition intended to be given by that will, the question before this court being whether the evidence excluded on the trial below was admissible for the purpose of identifying the subject of the devise.

The Case.

James Walker, who owned a good deal of real estate in the city of Washington, made his will in the the year 1832, when his family consisted of his wife and one child, his mother, three married sisters, and three brothers, the youngest of whom was Henry Walker. All these were living at the time of the testator's death, and Henry Walker was at that time about 11 years old. Rec., pp. 4–7.

The will purports to dispose of the whole of the testator's property, and to provide generously for all his family;

not one is omitted, and to each some real property is devised. Record, pages 4 to 6.

After some prefatory remarks, the testator proceeds: "And touching wordly estate wherewith it *has pleased* Almighty God to bless me in this life, *I give, devise and dispose of the same* in the following *manner and form.*" He then gives to his wife one-third of his personalty forever, and also one-third of his realty for life, with remainder to his infant son James Walker. He then gives a lot to his mother, a lot to his brother John, lots to his brother Louis, *a lot to his brother Henry*, lots to his sister Margaret, a lot to his sister Louisa, and a lot to his sister Sarah. He then gives a lot to his infant son James Walker, and then devises to him the balance of his real estate believed to consist in certain lots therein described. The balance of his personal estate he bequeaths in equal portions to his mother, his sister Sarah, and his brothers John, Louis and Henry.

This will was construed by this court in the case of Walker *vs.* Parker (13 Pet., 166). One of the testator's brothers thought the devise to him should be free from the widow's third, which he contended should be taken from the residue, and not from the specific devises. But this court said (p. 173):

"The devise of the balance of his real estate to his infant son goes on to describe particularly the property. * * The devises to the son are as specific as those to other persons, * * in the conclusion of the will certain lots are specifically devised to the son." And finally, on page 174: "*The entire real estate is specifically devised by this will.*"

It may be noted here: 1. That the will only purports to dispose of such real estate as the testator then had; and (2.) That by the law, as it then stood and still stands in the District of Columbia, he could dispose by will of none other.

The devise to Henry Walker (Record, p. 5) is as follows:

"I bequeath and give to my dearly beloved brother, Henry Walker, forever, lot numbered *six* in square four hundred and *three*, together with *the improvements thereon erected* and appurtenances thereto belonging."

Everything is clear and plain on the face of this devise; there is no patent ambiguity anywhere, but the moment it is sought to apply the words of the will to the property of the testator, *i. e.*, to see if they are sensible as to extraneous circumstances, it is found that he did not own any lot which answered *every* part of the description in the will, nor in fact did any *such* lot exist.

To be sure, there was in the city of Washington a lot numbered *six* in square four hundred and *three*, but *it did not belong to the testator* at the time of making his will, or at the time of his death, and he never had any title or claim thereto, and said lot had no "*improvements thereon erected*." There was also a lot numbered *three* in square four hundred and *six*. *He did own lot numbered three in square four hundred and six*, in fee simple at the time of making his will, and at the time of his death, and there were "*improvements thereon erected*," in the occupation of his tenants at the time of hisdeath. (Record, pp. 11 and 12.)

The testator has not elsewhere specifically devised lot 3 in square 406, and yet the express declaration in the beginning, and the whole scheme of the will show that the testator meant to dispose of all his property. It is quite clear that he meant to give a lot to his youngest brother, Henry Walker; that it was one of his improved lots, and that it was situated in the system of squares numbered four hundred in the city of Washington. It does not appear that the testator had any lots in any square numbered four hundred, improved or unimproved, except a lot in square 432 devised to his sister, Louisa, and lot *three* in square numbered *four hundred and six*, the lot claimed in this

suit. The mother of the testator, as guardian of his younger brother, Henry, claimed lot number three in square four hundred and six, under this devise, and collected two-thirds of the rents from the testator's tenants, the other third being collected by the widow. (Record, p. 7.) Henry, when he came of age, sold lot numbered three in square four hundred and six and his grantee collected the rents, and by a clear paper title that lot comes to the plaintiff in this suit. Record, pp. 7 to 11.

All the evidence offered by the plaintiff, except the will itself was objected to by the defendant and ruled out by the court on the ground that it was inadmissible to explain or alter the said will, and the jury were instructed that the plaintiff was not entitled to recover, and directed to find a verdict for the defendant.

Assignment of Error.

The court erred in excluding the parol evidence offered, to identify the subject of the devise, and to prove the possession under it.

The evidence offered and excluded was evidence tending to show "that the brothers and sisters of the devisor were named as follows: Lewis, John and Henry Walker, Louisa Ballard, Sarah McCallion and Margaret Peck, all living at the time of his death; that said brothers and sisters were all named in said last will and testament, and that they were the only brothers and sisters of the testator, and that there were no other brother or sister of said testator living at the time of his said death; that the said testator died leaving a widow named Ann Sophia Walker, who afterwards intermarried with one George Parker. Also an infant son, his only child, named James C. Walker, and his mother, Dorcas Walker, who afterwards became the guardian of the said Henry Walker, one of the testator's brothers aforesaid, and through whom the plaintiff claims, and who was a minor at the time of the

death of the testator, and his youngest brother, and about eleven years old at that time." Record, p. 6.

Also "evidence tending to show that the said testator was the owner of lot 3 in square 406 at the time of his death, and that said lot was then occupied by his tenants, and that thereafter his mother, the said Dorcas Walker, as the guardian for his minor brother, the said Henry Walker, continued for several years to collect in her capacity of guardian, two-thirds of the rents of said premises, and the other third was collected for Mrs. Ann Sophia Parker, widow of the said testator; and that the rents were thus collected upon a claim under the said will." Record, p. 7.

Also "evidence tending to show that the testator had no title to lot 6 in square 403 at the time of making his will, or at the time of his death, and never had any title or claim thereto; and * * * * * that he did own lot 3 in square 406, and that the fee-simple title thereto was in him at the time of making said will, and at the time of his death. Also that said lot 3 in square 406 was located on E street, N. W., between Eighth and Ninth streets, and was, at the time of making of the said will, and at the time of the death of the said testator, improved by having thereon a dwelling house; and that lot 6 in square 403 was located on Ninth street between I and K streets, and was unimproved at the time said will was made, and at the time of the death of the said testator." Record, pp. 11 and 12.

There is a clear distinction between evidence to prove the intention of the testator as an independent fact, and evidence of the circumstances and surroundings of the testator and the state of his property, offered for the purpose of *identifying the subject of a devise* (Wigram p. 54).

In this case there was no evidence offered to prove the intention as an independent fact.

Points.

I.

It is a well-settled principle, applicable alike to wills, deeds and written contracts in general, that extrinsic evidence is always admissible for the purpose of applying the writing to its proper subject-matter.

In the case of Bradley *vs.* The Packet Company, 13 Peters, page 99, this court said :

"The cases which we have thus collected together from amongst the very many which exist, will serve to show in how many aspects the question of the admissibility of extrinsic evidence, in relation to written contracts, has been presented and decided ; and in how many forms, according to the various circumstances of the cases, the principle which we have been considering has been applied. Sometimes it has been applied to deeds, sometimes to wills, and sometimes to mercantile and other contracts. In some cases it has been resorted to to ascertain which of several persons was intended ; in others, which of several estates. In some, to ascertain the identity of the subject ; in others, its extent. In some, to ascertain the meaning of a term, where it had acquired by particular use a particular meaning ; in others, to ascertain in what sense it was used, where it admitted of several meanings. But in all the purpose was the same—to ascertain by this medium of proof the intention of the parties, where, without the aid of such evidence, that could not be done , so as to give a just interpretation to the contract." * * *

And in the same case on page 102.

"All the cases which we have cited, in which extrinsic evidence has been received, and those which we have supposed, in which we think that it would be admissible, proceed on one principle only, and can only be justified on

that principle. And that is this: that the rule which admits extrinsic evidence, for the purpose of applying a written contract to its proper subject-matter, extends beyond the mere designation of the thing on which the contract operates; and embraces within its scope the circumstances under which the contract concerning that thing was made; when, without the aid of such extrinsic evidence, such application of the written contract to its proper subject-matter could not be made."

"It is undoubtedly essential to the validity of a grant," says Mr. Chief Justice Marshall, in Blake *vs.* Doherty, 5 Wheaton, pages 362–363, "that there should be a thing granted, which must be so described as to be capable of being distinguished from other things of the same kind. But it is not necessary that the grant itself should contain such a description as, without the aid of extrinsic testimony, to ascertain precisely what is conveyed. Almost all grants of land call for natural objects which must be proved by testimony consistent with the grant, but not found in it. Cane creek, and its west fork, are to be proved by witnesses. So the hickory which is to constitute the beginning of a survey of a tract of land to lie on the west fork of Cane Creek. If, in the nature of things, it be impossible to find this hickory, all will admit the grant must be void. But if it is not impossible, if we can imagine testimony which will show any particular hickory to be that which is called for in the grant, then it is not absolutely void for uncertainty, whatever difficulty may attend the location of it."

In the case of Atkinson's Lessees *vs.* Cummins, 9 Howard, p. 485, this court said:

"It is contended that this testimony [parol] ought not to have been received, "because 'the levy, *fieri facias*, *venditioni exponas*, sheriff's deed, &c., are records, and parol evidence is not admissible to contradict, vary, or limit the description of the premises contained in them."

"This proposition is undoubtedly true. But it assumes the very fact in dispute, and on which the jury were about to pass, on parol proof given by both parties. It is true that, if a sheriff levies on a whole tract of land, and describes it accurately in his levy and deed, parol testimony cannot be received to show that he intended to sell less than his deed describes, or that he excepted a part of the premises at the time of the sale.

"But that is not the case before us. The testimony offered is not to contract the levy and deed, but to explain and confirm them. The plaintiff's testimony had shown that there was a latent ambiguity on the face of his deed. * * * * *"

Mr. Justice Bradley, in discussing this question in Reed *vs.* Insurance Company, 95 U. S., p. 30–31, says:

"A strictly literal construction would favor the latter meaning. But a rigid adherence to the letter often leads to erroneous results, and misinterprets the meaning of the parties. That such was not the sense in which the parties in this case used the words in question, is manifest, we think, from all the circumstances of the case. Although a written agreement cannot be varied (by addition or subtraction) by proof of the circumstances out of which it grew, and which surrounded its adoption, yet such circumstances are constantly resorted to for the purpose of ascertaining the subject-matter and the standpoint of the parties in relation thereto. Without some knowledge derived from such evidence, it would be impossible to comprehend the meaning of an instrument, or the effect to be given to the words of which it is composed. This preliminary knowledge is as indispensable as that of the language in which the instrument is written. A reference to the actual condition of things at the time, as they appeared to the parties themselves, is often necessary to prevent the court, in construing their language, from falling into mistakes and even absurdities. On this subject, Professor

Greenleaf says: 'The writing, it is true, may be read by the light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties; but as they have constituted the writing to be the only outward and visible expression of their meaning, no other words are to be added to it, or substituted in its stead. The duties of the courts in such cases is to ascertain, not what the parties may have secretly intended, as contradistinguished from what their words express, but what is the meaning of the words they have used.' 1 Greenlf. Evid., sec. 277. Mr. Taylor uses language of similar purport. He says: 'Whatever be the nature of the document under review, the object is to discover the intention of the writer as evidenced by the words he has used; and, in order to do this, the judge must put himself in the writer's place, and then see how the terms of the instrument affect the property or subject-matter. With this view, extrinsic evidence must be admissible of all the circumstances surrounding the author of the instrument. (Taylor Ev., Sec. 1082. Again, he says: 'It may, and indeed it often does, happen, that, in consequence of the surrounding circumstances being proved in evidence, the courts give to the instrument, thus relatively considered, an interpretation very different from what it would have received, had it been considered in the abstract. But this is only just and proper, since the effect of the evidence is not to vary the language employed, but merely to explain the sense in which the writer understood it. *Id.*, Sec. 1082."

In Maryland *vs.* Railroad Company, (22 Wallace, page 112), Mr. Justice Strong cited the case of Aspdin *vs.* Austin (5 Ad. and Ell., N. S., 611), where Lord Denman said: "It is one thing for the court to effectuate the intention of the parties to the extent to which they may have *even imperfectly* expressed themselves, and another to add to the instruments all such covenants as, upon a full consideration, the court may deem fitting for completing

the intention of the parties, but which they, either purposely, or unintentionally, have omitted. The former is but the application of a rule of construction to that which is written ; the latter adds to the obligation by which the parties have bound themselves, and is, of course, quite unauthorized, as well as liable to great practical injustice in the application ;" and on page 113 Mr. Justice Strong thus states the distinction above alluded to fully admitting the general principle: "Ordinarily a reference to what are called 'surrounding circumstances' is allowed for the purpose of ascertaining the subject-matter of a contract, or for an explanation of the terms used, not for the purpose of adding a new and distinct undertaking."

II.

In the case of a will, parol evidence which will place the court in the position of the testator with reference to extrinsic circumstances is always admissible, and the spirit in which courts approach the construction of wills, and the considerations which govern them in the admission of evidence are more liberal than in the case of other writings.

Lord Abinger in Hiscocks. *vs.* Hiscocks, 5 M. and W , 363 uses the following language :

"The object in all cases is to discover the intention of the testator. The first and most obvious mode of doing this is to read his will as he has written it, and collect the intention from his words ; but as his words refer to facts and circumstances respecting his property and his family, and others whom he names and describes in his will, it is evident that the meaning and application of his words cannot be ascertained without evidence of all those facts and circumstances. To understand the meaning of any writer, we must first be apprised of the persons and circumstances that are the subjects of his allusions, or statements, and if

these are not fully disclosed in his work we must look for illustration to the history of the times in which he wrote and to the works of contemporaneous authors. All the facts and circumstances, therefore, respecting the person, or property, to which the will relates, are undoubtedly legitimate and often necessary evidence to enable us to understand the meaning and application of his words."

In the case of Finlay *vs.* King (3 Pet., 347), Chief Justice Marshall says (pp. 376–7):

"The intent of the testator is the cardinal rule in the construction of wills, and if the intent can be clearly perceived, and is not contrary to some positive rule of law, it must prevail; although in giving effect to it some words should be rejected or so restrained in their application, as practically to change the literal meaning of the particular sentence. * * * To effect this intention the court will vary the strict meaning of the words, and even transpose them." Page 382.

In the same volume (3 Pet., 117) this court, in the case of Inglis *vs.* Trustees, quotes, with approbation, Lord Mansfield, in Chapman *vs* Brown, 3 Burr., 1634:

"To attain the intent," he says, "words of limitations shall operate operate as words of purchase, implication shall supply verbal omisions. The letter shall give way; every inaccuracy of grammar, every impropriety of terms shall be corrected by the general meaning, if that be clear and manifest."

And in the case of Smith *vs.* Bell, 6 Peters, 75, Chief Justice Marshall said (p. 79):

"As this construction destroys totally the legacy intended for the son by his father, it will not be made, unless it is indispensable. No effort to explain the words in a different sense can do so much violence to the clause as the total rejection of the whole bequest given in express terms to an only son."

In the case of Lingdern *vs.* Lingdern, 9 Beavans, the Master of the Rolls thus considered a will specifically bequeathing property by a description which did not fit exactly anything which the testator owned.

"I cannot assume that the testatrix meant nothing by her bequest, or that she caused it to be inserted in her will in mere mockery, meaning only to delude and disappoint the objects of a pretended bounty. It ought rather to be assumed that she had a rational meaning; and the real question is, whether that meaning or the true effect of her will can be discovered by the addition of evidence consistent with the rules of law."

In 18 Howard, page 393, (Allen's Executors *vs.* Allen *et al.*) this court said:

"That the court may put itself in the place of the testator by looking into the state of his property, and the circumstances by which he was surrounded when he made the will, is not only true, as a general proposition, but without such information it must often happen that the will could not be sensibly construed. Wigram (10, 60) lays down the rule with much distinctness."

Wigram's fifth proposition, under which is found pl. 60, is as follows:

"For the purpose of determining the object of a testator's bounty, or the subject of the disposition or the quantity of interest intended to be given by his will, a court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and of his family and affairs, for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will. The same (it is conceived) is true of every other disputed point respecting which it can be shown that a knowledge of extrinsic facts can in any way be made an-

cillary to the right interpretation of the testator's words."

And in King *vs.* Ackerman, 2 Black. 417:

"Courts have always been *astute*," says this court, "as we have said, to find reasons for rescuing a will from the artificial rule established in favor of the heir-at-law, and will not even be *acute* in searching for reasons to restore its force, where the statute has not abolished it." And then, on page 418, a distinction similar to that drawn by the court in 22d Wallace, with reference to contracts is thus stated: "A court may look beyond the face of the will where there is an ambiguity as to the person or property to which it is applicable, but no case can be found where such testimony has been introduced to enlarge or diminish the estate devised."

In the case of Clarke *vs.* Boorman's Executors. (18 Wall., pp. 502-3), Mr. Justice Miller said:

"Very few classes of question are more frequent or more perplexing in the courts than the construction of wills. If rules of construction laid down by the courts of the highest character, or the authority of adjudged cases, could meet and solve these difficulties, there would remain no cause of complaint on that subject, for such is the number and variety of these decisions that every form of expression would seem to be met. * * * To these considerations it is to be added that of all legal instruments wills are the most inartificial, the least to be governed in their construction by the settled use of technical terms, the will itself being often the production of persons not only ignorant of law but of the correct use of the language in which it is written. Under this state of the science of the law, as applicable to the construction of wills *it may well be doubted if any other source of enlightment in the construction of a will is of much assistance, than the application of natural reason to the language of the instrument under the light which may be thrown upon the intent of the testator by the extrinsic circumstances surrounding its execution, and connect-*

ing the parties and the property devised with the testator and with the instrument itself."

This court (in Blake *vs.* Hawkins, 98 U. S. 324) said that the circumstances of the testator, the condition of his family, the amount and character of his property should be taken into consideration. "The interpreter may place himself in the position occupied by the testator when he made the will, and from that standpoint discover what was intended."

"It seems to be the universal rule in America," says Redfield (Law of wills, 536) "in regard to the admission of parol evidence to explain written instruments, and especially with regard to wills, that such testimony, showing the condition of the subject-matter upon which the writing is to operate, as the state of the testator's property, is always admissible to explain a latent ambiguity: or to aid the construction, whether the ambiguity be latent or patent."

III.

In the case of a latent ambiguity in a will, or other writing, which can only appear by extrinsic evidence, parol evidence, such as was offered, is always admissible to explain the ambiguity.

In the case of the misdescription in the sheriff's deed, above cited from 9 Howard, the court says, p. 485:

"The deed in this case called for but a single tract of land, the purchaser had himself taken possession and held up to certain boundaries for near twenty years, and had thus, by his acts, given his own construction of an ambiguity in his deed which he now showed by extrinsic evidence to exist. The evidence offered tended to confirm what appeared by the face of the deed that but one tract was sold." * * * * * .

"It would be of little profit to notice the infinite variety of cases on this subject, or to seek for one precisely in point with the present. The general rule is well stated by Tindal, Chief Justice, in the case of Miller *vs.* Travers (8 Bing., 244), that 'in all cases where a difficulty arises in applying the words of a will, or deed, to the subject-matter of the devise, or grant, the difficulty, or ambiguity, which is introduced by the admission of extrinsic evidence may be rebutted, or removed, by the production of further evidence upon the same subject-matter calculated to explain what was the estate, or subject-matter really intended to be granted, or devised.'" 9 Howard, p. 485.

In the case of Barry *vs.* Coombe, 1 Peters, pages 651–652, this court, speaking of a description of property in a writing says:

"If that description be fatally ambiguous, it is certainly a sufficient ground to rufuse relief The ambiguity here arises from the use of the capital letters, E. B. in the description of the premises; and if these letters stood alone, and unconnected with anything that could give them a definite signification, there would be much reason to doubt whether the defect would be curable. The words are "your ½ E. B., wharf and premises," and it is argued that this is one of those ambiguities, generally designated by the epithet—patent, and as such, admitting of no explanation from extrinsic evidence."

Sir Francis Bacon, in his elements of common law (Regula., 23), is the author usually referred to on this distribution of ambiguities into patent and latent; the former appearing on the face of the instrument, and not to be removed by extrinsic evidence, but only, in the language of the author, "To be holpen by construction or election;" the latter raised by reference to extrinsic circumstance and remedial by the same means. It perhaps would be a more convenient, and certainly more intelligible distribu-

tion of the doctrine on this subject, if the cases were divided into positive, relative and mixed; the positive corresponding to the patent; and the relative to the latent ambiguities of the authors who treat of the subject. The mixed would consist of those cases, in which, although the ambiguity is suggested on the face of the instrument, the face of the instrument also suggests the medium by which the ambiguity may be removed.

The facts of this case will bring it either within the second or third class; within the second, because, for anything that appears on the face of the instrument, E. B. wharf, may be as definite a description of locality as F street, and then the ambiguity could only arise, if it be shown that the bargainer had more than one house on F street, like the two manors of Sale, put by several authors.

Perhaps this case belongs more properly to the third class, since the description suggests several circumstances of identity, by reference to which, the premises in question are distinguishable from all others; first, it is a wharf; secondly, a wharf the property of Barry; thirdly, a wharf of which he owns a moiety; and connected with these descriptive circumstances, the letters E. B. became in fact the initials of the name of a place; and the case is analogous to that of a will, in which the devisee is designated as my son A, my nephew B C, or my uncle D E, in which the circumstance of relationship will let in evidence to fill up the names designated by the initials."

In Allen *vs.* Lyons, 2 Wash., 477, Mr. Justice Washington said: "The ambiguity in T. C.'s will is latent and may be explained by parol evidence. It does not appear that he had any house on Third street, but he had one on Fourth street, and that was in the occupation of R. H. If the jury are satisfied that this was the house intended * * then the verdict ought to be for the plaintiff."

IV.

The parol evidence was competent evidence, and should have been admitted. It was offered "to identify the * * thing intended by the testator,"—to identify the thing devised to Henry Walker in the will, &c."

In River's case, 1 Atkyn's, 410, there was a devise of real estate to be shared between testator's "sons, James and Charles." It was objected that claimants were illegitimate, through reputed, sons of testator, and that they could not take as sons, but the court held designation sufficient under the circumstances. It was likewise objected that testator had made a mistake in the names, and therefore claimants could not take; but Lord Hardwicke said: "The law is otherwise, for if a man is mistaken in a devise, yet if the person is clearly made out by averment to be the person meant, and there can be no other to whom it can be applied, the devise to him is good."

"If a man devises a specific thing which he has not, this is a plain mistake." Purse *vs.* Surplin, 415, 1 Atkyns.

In Minshull *vs.* Minshull, 1 Atkyns, 411.

Devise to "Randall Minshull, eldest son of my nephew, Randall Minshull * * * * * and over, to the second son of the said Randall Minshull."

Question. Whether said Randall Minshull meant the devisee, Randall Minshull, or the devisee's father, Randall Minshull?—issue directed to try matter of fact by Lord Chancellor Hardwicke, who said:

"It was a matter that lay properly in averment, and was determinable by circumstances proving the intention of the testator one way or the other."

The parties, however, having agreed to submit the case to the court the chancellor said:

"This case will depend on the words of the will with regard to the person intended by the testator by the name of Randall, and the legal operation of the words made use of, and a court never construes a devise void unless it is so absolutely dark that they cannot find out the testator's meaning." Decreed for plaintiff.

The case of Powell *vs.* Biddle, Adm'r, 2 Dallas, (Court of Common Pleas of Penna., 1790,) was an action of debt to recover a legacy, under the following circumstances: The testator by his last will and testament bequeathed "unto his friend, Samuel Powell (son of Samuel Powell of the city of Philadelphia, carpenter), the sum of one hundred pounds in specie, to be put out at interest by his executors; the whole principal and interest to be paid to the said Samuel Powell, when he shall attain twenty-one years of age. But in case he shall depart this life, in his minority, or before the said legacy be paid to him, then the same to sink into the residue of the testator's estate," &c. At the trial of the cause, evidence was offered, and admitted, to show that, though the legacy was bequeathed to Samuel Powell, it was, in fact, intended for the plaintiff, whose Christian name is William. And a verdict was, thereupon, allowed to be taken in favor of the plaintiff, for the principal sum and interest, subject to the opinion of the court, on a rule to show cause why there should not be a new trial. The facts proved were, that William, the plaintiff, had attained the age of twenty-one years; that he was the younger son of the testator's deceased daughter, who had been married to Samuel Powell, the carpenter, named in the will; that he was well known to the testator; and that the testator usually, by mistake, or by way of nickname, called him Samuel; but that Samuel Powell, the carpenter, had another son, a mason, whose name was actually Samuel, the issue of a second marriage, and with whom the testator had no connection or acquaintance whatever. * * *

"For the defendant it was alleged that in no instance had a legacy been awarded contrary to the express designation of the will, when a person of the name and description of the legatee existed, capable of taking the bequest." * * * *

"Shippen, President: The court entertain no doubt in this case; and, therefore, ought not to postpone a decision. The bequest was made to a person who was always called Samuel by the testator, though in fact named William, and whom the testator had nurtured and educated from his infancy; when, on the other hand, he did not even know the person really called Samuel. The evidence to explain those facts was proper to be laid before the jury; and their verdict perfectly accords with the law and equity of the case. Therefore, let the rule be discharged."

Lord Charles Baltimore, second, by his will made in 1750, devised Anne Arundel manor to "Benjamin Calvert, Esq., his heirs and assigns forever;" and in 1773 Benedict Calvert, the natural son of Lord Charles brought ejectment for the manor, claiming under this devise. This suit involved questions of the greatest importance affecting most of the titles in the province of Maryland, and was conducted by learned and eminent counsel in this country, under the advice of eminent counsel in England, one of whom, the learned annotator of Coke Littleton, Francis Hargrave, in an opinion given for the use of the counsel in that case, published with the report of the case in the Maryland Reports (2 Har. & McH., 349), said, as to the variance between the names of plaintiff in ejectment and the devisee named in the will:

"I have not observed anything in respect to the mistake of Mr. Calvert's christian name in the will under which he claims, because I apprehend that there cannot be the least doubt of his right to prove the mistake by parol evidence.

Francis Hargrave, Lincoln's Inn, 17th January, 1774."

Accordingly, at the trial, evidence was offered and admitted without objection to identify the plaintiff, Benedict Calvert, with the devisee, Benjamin Calvert, named in the will, and the jury found that the plaintiff was the person described in the will, and though judgment went against him for want of title in the devisor, Justice Chase, of this court, who sat in the Court of Appeals when the case was decided there, mentioned the case in 4 Cr., 233, as authority for the admission of parol evidence to correct a mistake of names.

Doe *vs.* Huthwaite, 3. B & A,, 632. Devise to Stokeham Huthwaite, second son of John, and in default of issue to John, third son of said John. In fact John was second son, and Stokeham third son. The court left it to the jury to determine whether the mistake was in the name or in the description.

See also Bradshaw *vs.* Bradshaw, 2 Y. & Coll., 72.

And Lord Abinger in awarding a new trial in Hiscocks *vs.* Hiscocks, 5 M. & W., 363, cites the last two cases as authority, and while denying the admissibility of declarations of the testator says "If, therefore by looking at the surrounding facts *to be found by the jury*, the court can clearly see, with the knowledge which arises from these facts alone that the testatator meant either the lessor of the plaintiff or the defendant, it may so decide and instruct the jury accordingly."

In the case of Allen *vs.* Lyons (2 Wash., 477, *supra*) Justice Washington left the question of identity to the jury.

V.

There is a marked distinction between those cases where the exact words of the will had some operation, and those where they have none ; where a devise is operative, and where it wholly fails.

In the former cases courts have shown themselves uniformly disposed to insist on the literal sense of the words of the will. In the latter they have acted on the principle laid down by Chief Justice Marshall, in 6 Peters, above cited, that "no effort to explain the words in a different sense can do so much violence to the clause as the total rejection of the whole bequest" and have sought diligently amongst the property of the testator with all the light obtainable from extrinsic circumstances for some subject on which the bequest or devise might operate.

Among the cases of the first class, which generally recognize the distinction are, the following :

Doe. dem. Browne *vs.* Greening, 3 Man. and Sel. 171.

A devise of all estate and interest whatever * * at Coscomb. Evidence was offered that another estate not at Coscomb was formerly united with and enjoyed with that at Coscomb and should be held to pass with it. The judge rejected the evidence being of the opinion that as it appeared that the testator had land at Coscomb which was sufficient to satisfy the devise, the evidence was not admissible.

Newton *vs.* Lucas, 6 Sim. 54.

Testatrix devised all her messuages situate in Denmark Court. She had five houses in that court and another which abutted on it. Evidence being given of the exact position of the last mentioned house which was claimed under the devise with the other five, the Vice-Chancellor having noticed a supposed case proceeds : "But that is not the question before me ; because if this testatrix had not had the five houses in Denmark Court, and had devised her messuage in Denmark Court, there is sufficient evidence in the case to allow the house No. 383 to pass. But it is quite plain that No. 383 was not situated in Denmark Court, and as she has houses which would satisfy

the description which she has used, the house 383 cannot be held to have passed by the words, "my freehold messuage in Denmark Court."

In Miller *vs.* Travers, 8 Bing., 244, a testator had devised all his lands in the County of Limerick, and City of Limerick—the city being in the county, and he had none in the county outside of the city. It was proposed to prove that he had instructed the scrivener to devise lands in the County of *Clare*, and City of Limerick; the court held that as there were lands to answer the description of the will—in the County of Limerick, and in the City of Limerick, the evidence could not be received. The court said that wherever a difficulty arose in applying the words of a will to the thing which is the subject matter of a devise, parol evidence may be admitted to remove an ambiguity produced by extrinsic evidence, but here was no ambiguity.

Among the cases of the second class, of which there is almost an infinite variety, are the following:

Pacy *vs.* Knolly, Brownlow, 131.

Devise of houses and lands lying in the parish of Billing, and in a street called Brook street; the testator had no lands in the parish of Billing, or in Brook street; held a good devise of lands in Billing street.

Doe. dem. Humphreys *vs.* Roberts, 5 B. & Ald., 407.

Devise of dwelling and other houses in High street; testator had none but the dwelling in that street, but had some others in a lane contiguous thereto; held a good devise of houses in the lane.

Bayly, J.: "What other buildings are there in High street to satisfy the will in this case?"

Abbott, J.: "In fact he had no premises in that street, except the principal messuage, unless these cottages are to be considered as coming within the description."

Bayly, J.: "If the description is precise, and there are premises to satisfy it, and there are other premises also, then the others will not pass. If, however, the description is not precise, and if you cannot satisfy the will unless additional property passes besides that which is described, then you must presume that the testator intended to pass that property, and that his description is inaccurate."

Holroyd, J., after stating how the cottages answered the description, adds, "and as there is no other property to satisfy the will, I am of opinion that the property ought to pass." So held.

In Merrick *vs.* Merrick, 37 Ohio State, 127, the testator devised the E. ½, S. E. ¼ of section 28, in township 1, range 3, E. to A. R. M.; did not own it; owned N. E. ¼. The court: "The inquiry then is, whether the description in the third item is referable to the fact that the testator must have supposed he had a devisable interest in the premises there described, or whether the mistake claimed, that is, the use of the word south, when north was intended, was really made. *Which is the more reasonable supposition?*" The word "south" rejected and devise held good for the N. E. quarter.

In Cleveland *vs.* Spilman, 25 Ind, 95, the testator had made a mistake in his description, and had exactly described property which he did not own, and the court said: "To say he intended to dispose of land to which he made no claim and had no title whatever, would be absurd, and cannot be thought of."

In Moreland *vs.* Brady, 8 Oregon, 303, a devise of lots 1 and 2, which testator did not own, was held to pass lots 3 and 4, which he did own.

In Winkely *vs* Kaim, 32 N. H., 257, a devise of lot 37, which the testator did not own, was held to pass lot 97, which he did own, and which was not mentioned in his will. This case is in conflict with the case of Kurtz and Hibner (55 Ill., p. 514), which, however, is condemned by

Redfield, and the correctness of the decision of the New Hampshire court is ably championed (Am. Ca., p. 546): "He could not give land he did not own, and the law presumes," says Redfield, "that he intended to give land he did own."

Selwood *vs.* Mildmay, 3 Ves., 306. Bequest of 4 p. c. bank annuities; had none; held to pass 4 p. c. Long annuities.

Door *vs.* Geary, 1 Ves., Sr., 255. Bequest of £700 East India stock; had none; held to pass £700 bank stock.

Lord Hardwicke: "In the construction of wills, the testator must be held to mean something if it can." (*Sic.*)

Dobson *vs.* Waterman, 3 Ves., 308. Bequest of £700 capital stock in the 3 p. c. consolidated bank annuities, standing in testator's name in the Bank of England; had no stock of any kind at the bank; had £1,500 3 p. c. South Sea annuities—held to pass £700 of these. Lord Kenyon: "The state of the testator's property made it manifest that he was under a mistake as to the particular stock," &c.

Pentecost *vs.* Ley, 2 Jac. & W., 207. Bequest of £1,000 long annuities "now standing in my name or in trust for me:" Had none; had £1,000 3 p. c. reduced annuities; held to pass them. Chief Baron: "It being clear that she intended to give something, we must try as well as we can to make out what it was. Now she had, at the date of her will, a sum of £1,000 3 p. c. reduced annuities, and having nothing to answer the description so nearly as that sum, it being clearly a mistake, it seems to me that we are obliged to consider that when she *said* £1,000 long annuities, she meant these reduced annuities."

Clark *vs.* Atkins, 90 No. Car, 629. Bequest of bank stock in Citizens' National Bank and Merchants & Farmers' National Bank. Testatrix had no stock in the Citizens' National Bank, but had railroad and state bonds deposited there. The bonds were held to pass by the will, the court: "She had no stock in the Citizens' National

Bank, but she manifestly intended to bequeath something ; what was it ? The bonds were the only things she had in the bank, and the inference is irresistible that they were the things which by a misdescription she called the bank stock."

The same principles have governed those cases where there is a mistake in the name or description of the person instead of the thing—in the object instead of the subject—of the devise or bequest.

In the first class :

Tucker *vs.* The Seaman's Aid Society, 7 Metc., 188, the testator gave a legacy to the Seaman's Aid Society in the City of Boston ; another society denominated the "Seaman's Friend's Society" claimed the legacy and offered to show that the testator had no knowledge of the existence of the society named, but did know of the society claiming, and was interested in its work. But this court held that inasmuch as there was a society exactly answering the description in the will which could take the bequest, and the will would be operative, the society named was entitled.

In the second class :

Button *vs.* American Tract Society, 23 Vt., 336, a bequest had been made to the American Home Mission Tract Society for our Foreign Missions. There was no such society. Two claimants appeared; the American Tract Society, and the American Home Missionary Society. Evidence was admitted to show that the testator took most interest in the former, and had expressed a preference for it, and it was held entitled-

In the Trustees *vs.* Peaslee, 15 N. H., 317, there was a devise to the Franklin Seminary of Literature and Science; there was no such society, and it was awarded to the South

Newmarket Methodist Seminary, although every particular of description on the face of the bequest was mistaken except the single word seminary.

And see—

Pincairn *vs.* Brase, Finch, 403.
Dowsett *vs.* Sweet, Amb., 175.
Parsons *vs.* Parsons, 1 Ves. Jr., 266.
Smith *vs.* Coney, 6 Ves., 42.
Garth *vs.* Meyrich. 1 Br. C. C., 30.
Stockdale *vs.* Bushby, 9 Coop., 229.
Doe *vs.* Danvers, 7 East., 299.
Hampshire *vs.* Pearce, 2 Ves. Sr., 218.
Beaumont *vs.* Fell, 2 P. Wms., 141.

VI.

The admitted power of courts to transpose words and clauses in wills to effectuate the intention of the testator has been applied in cases closely resembling the case at bar.

In Bradwin *vs.* Harper, Ambler, 374, testatrix bequeathed personal estate for life to her niece, Mary Bradwin, and at her death, "one moiety * * to be paid to the said Mary Bradwins' grandchildren, the children of her daughter Mary, at the age of 21, and the other moiety to be paid to Annie, the daughter of the said niece Mary Bradwin."

Bill brought by Mary, daughter of Mary Bradwin, for her moiety; she was unmarried and had no children, and Annie was dead, leaving children. It was proved that when she made her will she lived in Derbyshire, and that Mary Bradwin, her niece, and her family lived at St. Alban's in Hertfordshire, and that the testatrix had never seen her niece's children or grandchildren. His honor, the master of the rolls "was satisfied of the mistake and of the power

of the court to set it right by decreeing according to the intention but doubted at first whether he could do so for want of parties" but finally "decreed the money to be paid."

The effect of this decision was to make the will read Mary and the children of Ann, instead of Ann and the children of Mary.

In Mosely *vs.* Massey, 8 East., 149, testator gave his fee in Radnor to A, and his reversion in Monmouth to B. His fee was in Monmouth and his reversion in Radnor. "It was held that comparing the devising clause with the recital *and the facts*, sufficient appeared to ascertain beyond a doubt that the *devisor had made a mistake* in the local description, and that *his intent was* to pass the present interest of his estate in fee in possession which was in the County of Monmouth, and the reversion of his settled estate in the County of Radnor, although he had respectively *misdescribed their local situations*." (Jarman, p. 441.)

In Ex parte Hornby, 2 Bradford, 240. Bequest to "my nephew James Hornby, son of my brother Frederick." Brother Frederick had no son James, but brother James had a son Frederick. The scrivener testified that the instructions were for a bequest to James' son, Frederick. The surrogate: "Aside of the proof offered of the intentions of the testator in the present instance, the principle that in construing a will, words may be transposed to effectuate the testator's intentions as gathered from the will and from existing facts proved extrinsically, comes in aid of the bequest now under consideration. [Cases cited]. The right to transpose where, from evidence, it appears that the clause of the will, as it stands, is inapplicable to an existing state of facts, but if transposed will be consistent and applicable, is sustained by these cases." Decreed accordingly.

"There is no more clearly established rule of construction as applicable to wills, than that words or clauses of sen-

tences may be transposed to any extent with a view to show the intention of the testator. * * * But it must appear either from the context or extrinsic proof admissible in aid of the construction of the words that the transposition does really bring out the true intent of the testator, and thus render what was before obscure clear." Redf., p. 432.

Now, in the present case, without changing, or supplying, or rejecting a single word or figure, or letter, and by simply transposing the words "six" and "three" the true intent of the testator is brought out and what was before obscure is rendered clear.

The cases all illustrate the fundamental rule by which courts are governed in dealing with a will, viz.: *to carry out the intention of the testator, and, if possible, not to allow it to be defeated.* They do not seek to *make* an intention for him, nor do they look for an intention not in the will, but finding that he has expressed some intention in the paper, they are solicitous to ascertain what that intention was.

In the District of Columbia the law is the same to-day with reference to the devising of after acquired property as it was in England when text writers, and judges on the bench, put their supposed cases, and decided actual cases without once considering whether the devise applied accurately to anything *not* belonging to the testator, which was wholly without the possible purview of the will.

The fact that there is a lot accurately described as far as its arbitrary designation on the plat of the City of Washington is concerned cannot affect this devise any more than the fact that there is such a lot laid down on the plat of the City of Melbourne in Australia. But the description in the devise is not in every particular an accurate description even of lot 6 in square 403 with which the testator and his will are shown to be entirely unconnected.

The devise is of a lot with "improvements thereon erected"—lot 6 in square 403 had no improvements "thereon erected." This makes it absolutely certain that the testator did not, *in fact*, devise in his will a lot which he did not own, while, *in law*, it was impossible for him to do so.

The real estate devised, including the residue, being all described by lots and squares, the will purports to contain a schedule of all that the testator owned; and lot 3 in square 406, which he did own, is not otherwise described than as lot 6 in square 403.

The last devise in the will purports to give a schedule of all his property which the testator had not disposed of; it does not contain lot 3 in square 406; and it consequently asserts, by implication, that lot 3 in square 406 had been devised in a previous clause, and if so, then it was devised by the description of lot 6 in square 403.

Read, as defendant contends the will should be read, the testator has failed in his expressed intentions. He has not confined himself to disposing of the estate which he possessed, but has undertaken to dispose of property which he did not possess; he had not disposed of all the property he possessed, but left undisposed of a parcel *which was yielding him revenue, and must have been in his mind*; he has not left his dearly beloved brother a parcel of improved property by that devise, but has "caused it to be inserted in his will in mere mockery, meaning only to delude and disappoint the objects of a pretended bounty."

The testator has used five distinct "*signa*" to designate the lot devised. All these "*signa*" are found in the description of the lot claimed, but not in the order in which he has named them. In the order in which they stand in the will four of them are applicable to an existing subject, but the fifth is wholly inapplicable.

The maxin "*ex multitudine signorum colligitur identitas vera*," is of equal authority with and supplements the oft

quoted maxim, "*falsa demonstratio non nocet cum de corpore constat*." The *corpus* here appears "a lot with improvements thereon erected," and from the multitude of *signa* the "*identitas vera*" can be collected by "*the application of natural reason to the language of the instrument under the light which may be thrown upon the intent of the testator by the extrinsic circumstances surrounding its execution, and connecting the parties and the property devised with the testator and with the instrument itself.*"

CONCLUSION.

It is submitted that the judgment should be reversed, and the cause remanded with directions to award a new trial.

JOHN D. McPHERSON,
CALDERON CARLISLE,
For Plaintiff in Error.

SUPREME COURT OF

JOHN PATCH, *Plaintiff in Error*,

vs.

ELIAS R. WHITE, *Defendant in Error*.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1885.

JOHN PATCH, *Plaintiff in Error*,
vs.
ELIAS E. WHITE, *Defendant in Error.*
No. 58.

Statement of Case.

The case comes to this Court on a writ of error to the Supreme Court of the District of Columbia, and is an action of ejectment instituted by John Patch against Elias E. White, to rerover two undivided third parts of lot numbered three (3), in square numbered four hundred and six (406), in the City of Washington, in the District of Columbia.

At the trial, the plaintiff, to maintain his action, offered in evidence a deed to himself dated December 8th, 1873, from the heirs of John Brereton (Record, 10), one from Thomas Sewell to Brereton, dated February 5th, 1851, (Record, 8), and a deed to Sewell from Henry Walker, bearing date January 29th, 1842, (Record, 7), each of these deeds purporting to convey the entire title to lot numbered three (3), in square numbered four hundred and six (406).

To prove title to the property in Henry Walker, the plaintiff then offered in evidence the will of James Walker, dated September 17th, 1832 (Record, 4), and duly admitted

to probate. In this will, after a devise of one-third of his real estate to his widow for life, with remainder to his infant son, James Walker, the testator among, other provisions incorporated the following: (Record, 5).

> "I bequeath and give to my dearly beloved brother, Henry Walker, forever, lot numbered six, in square four hundred and three, together with the improvements thereon erected and appurtenances thereto belonging."

As will be perceived the lot and the square designated in the will of James Walker, and that to which title is claimed by the plaintiff in error, are not the same; but the plaintiff, at the trial, offered parol evidence, which he insisted, if admitted, would tend to prove that the above provision of the will should be considered, and was, in fact, a devise of lot three (3) in square four hundred and six (406), and not a devise of lot six (6) in square four hundred and three (403), as stated in the will.

The parol evidence proposed to be given was: That the said testator was the owner of lot three (3), in square four hundred and six (406), at the time of his death, and that said lot was then occupied by his tenants; that after his death, his mother, Dorcas Walker, as guardian for Henry Walker, the brother and devisee named in the will, who was a minor, for several years collected two-thirds of the rent of the premises as such guardian; that the other third was collected for the widow of the testator, and that the rents were thus collected upon a claim under the said will; that Thomas Sewell, grantee, in the deed from Henry Walker, collected two-thirds of the rent of said premises until his conveyance to John Brereton, and that one-third of the rent was collected by the representatives of the widow, and the residue was collected by one Walter C. Briscoe from 1851 to 1854; that the testator had no title

to lot 6 in square 403 at the time of making his will, or at the time of his death, and never had any title or claim thereto; and also offered evidence tending to show that the devisor did own lot 3 in square 406, and that the fee simple title thereto was in him at the time of making said will, as also at the time of his death; that said lot 3, in square 406 was located on E street, N. W., between Eighth and Ninth streets, and was, at the time of making of the said will, and at the time of the death of the said testator, improved by having thereon a dwelling house; and that lot 6 in square 403 was located on Ninth street between I and K streets, and was unimproved at the time said will was made, and at the time of the death of the said testator.

The above is stated in the bill of exceptions to be the substance and tendency of all the testimony on the part of the plaintiff. Rec. (p. 12.) All the evidence offered was objected to by the defendant except the will—the parol testimony being objected to on the ground that it was inadmissible for the purpose of altering or changing the said will, and the various deeds being objected to for matters appearing upon the face thereof. The evidence offered was admitted by the court subject to the objections presented to be passed upon at the close of plaintiff's case.

No evidence was offered to show that the plaintiff's title continued from the deed dated December 8th, 1873, to the time of filing the suit February 13th, 1879, or to show that the defendant, Elias E. White, claimed title to or was in possession of the said lot at that time or at any other time. The plaintiff having closed his case the defendant's counsel asked the court to rule that upon the evidence submitted as above, the plaintiff was not entitled to recover. Thereupon the court ruled, that the parol evidence offered was inadmissible to alter the said will; that the plaintiff was not entitled to recover upon the testimony, and instructed the jury to find a verdict for the defendant, which was done. To

this ruling and instruction the plaintiff's counsel excepted. Upon the hearing of the cause by the Court in General Term, upon the exceptions so taken, the judgment below was affirmed, and the cause comes here on a writ of error to that judgment.

Points.

The ruling of the court below was correct.

I.

The parol evidence was not admissible for the purpose for which it was offered.

The provision of the will of James Walker in question was as follows: (Printed Record p. 5, line 14, *et seq.*)

> "I give and bequeath to my dearly beloved brother, Henry Walker, forever, lot numbered six, in square four hundred and three, together with the improvements thereon erected and appurtenances thereto belonging."

From an examination of above provision it will appear that the will devises to Henry Walker lot No. 6, in square No. 403, and the court is asked to admit testimony tending to show that the intention was to devise lot No. 3, in square No. 406, in the City of Washington, D. C., that being the lot claimed in the present action. It is claimed for defendant in error that the language of the will is clear and unambiguous as to the subject of the devise, and the property designated can be easily located upon the plan of the City of Washington. To select any lot except lot No. 6, in square No. 403, as the object of the devise to Henry Walker, would be to make a new will for James Walker, after an expira-

tion of fifty years, which is against the theory and policy of the law. The generally accepted doctrine on this subject, a doctrine adopted by this court on many occasions, is declared in the case of *Miller* vs *Travers*, 8 Bingham, 244.

The question at issue in this case was over a devise under the will of Sir John Edward Riggs Miller. The testator devised—

"All his freehold and real estate whatsoever situate in the County of Limerick and the City of Limerick," to certain trustees therein named and their heirs. At the time of making his will, the testator had no real estate in the County of Limerick, but he had a small real estate in the City of Limerick, and considerable real estate in the County of Clare. The contention was, whether the plaintiff was at liberty by *parol evidence*, to show that the testator intended his estates in Clare also to pass under the same devise. Such was the character of the evidence offered as to lead the court, Chief Justice Tindale, to say :

"Indeed without entering more minutely into the details of the evidence it may be taken, for the purpose of argument, that if parol evidence was admissible by law, the evidence tendered in the case would be sufficient to establish beyond contradiction the intention of the testator to include his estates in Clare in the devise to the trustees."

Notwithstanding this impression produced by the extrinsic evidence offered, the learned Judge declares, page 247 :

"Upon the fullest consideration, however, it appears to the Lord Chief Baron and myself, that admitting it may be shown from the description of the property in the City of Limerick, that *some* mistake may have arisen yet," * * "as the intention of the testator to devise any estate in the County of Clare cannot be collected from the will itself, nor without altering or adding to the words used in the

will, such intention cannot be supplied by the evidence proposed to be given."

And the court continuing, then lays down the rules which have since been accepted and endorsed by the best text writers and jurists controlling the admission of extrinsic evidence in the construction and interpretation of wills, being the same applied by the court at the hearing of this case below. *Patch* vs. *White*, 1 Mackey, 468.

As above stated, the doctrine of *Miller* vs. *Travers* has been heretofore adopted and followed by this court.

The case of *Wilkins* vs. *Allen*, 18 Howard, 385, was an action of ejectment brought by the defendant in error to recover certain land of which Michael Allen died seized, the claim being that the lands did not pass by his will. The residuary clause was supposed to be of doubtful meaning and obscure. To remove the alleged obscurity, the offer by defendant below was made to prove from memoranda made by the testator at the time of the execution of said last will and testament, and upon the basis of which the same was prepared by him at and about the same time, what was his real meaning in the employment of the word "*surplus*," in the residuary clause of said will, and that the same was intended to comprehend his whole estate, as well real as personal. On motion of the plaintiff below, the court rejected the evidence proposed and instructed the jury that no title vested in the executors by the residuary clause. Upon review of the case, this Court says, page 393:

> "That the court may put itself in the place of the testator, by looking into the state of his property, and the circumstances by which he was surrounded when he made the will, is not only true as a general proposition, but without such information it must often happen that the will could not be sensibly construed. Wigram (10.60) lays down the rule with much distinct-

> ness. Such evidence, however, is only admissible to explain ambiguities arising out of extrinsic circumstances, as to persons provided for, objects of disposition and the like. * * But evidence cannot be heard to show a different intention in the testator from that which the will discloses Such is the established doctrine of this court, as was held in the case of *Weatherhead* vs. *Barksdale*, 11 Howard, 357. The only English case we will refer to is that of *Miller* vs. *Travers*, 8 Bing., 248."

After reviewing that case, the court continues, pages 393, 394:

> "The Lord Chancellor was assisted by the Chief Justice of the common pleas and the Chief Baron, and they all concurred in holding that the evidence offered could not be heard to change the import of the will, and refused the issue. And so it is manifest here that if the evidence were to show all that is assumed for it, yet it could not be heard to effect this will."

In *Smith* vs. *Bell*, 6 Peter, 68, (at page 75), the court uses this language:

> "The first and great rule in the exposition of wills, to which all other rules must bend, is that the intention of the testator expressed in his will shall prevail, provided it be consistent with rules of law. * * These intentions are to be collected from his words, and ought to be carried into effect, if consistent with law."

In the case of *Weatherhead* vs. *Baskerville* 11 Howard, 329, referred to above, Mr. Justice WAYNE, delivering the opinion of the court, says, page 357:

> "All of us agree—our learned brother who presided upon the trial of this case in the circuit court concurring, that so much of the testimony submitted to the jury to show a different intention in the testator or from that which his will discloses, was inadmissible."

The same rule was declared in *Mackie* vs. *Story*, 93 U. S., 589.

The question in this case was whether the whole legacy bequeathed by a will to two brothers accrued to Benjamin Story, the survivor, or whether one-half of it did so, leaving the deceased intestate as to the other half.

On the trial the children of one of the brothers offered parol evidence to show the good will and affection of the deceased towards their father, for the purpose of demonstrating the intention of the testator in the bequest. The court ruled that the testimony offered was properly rejected by the court below.

Mr. Justice BRADLEY, delivering the judgment of the court, says, page 589:

> "The paper must speak for itself, and its meaning and effect be ascertained by the court."

And the tenor of the reported cases on this subject and the teaching of the text writers is that the intention of the testator must be gathered from the language used in his will. Testimony which, in its nature and effect, merely explains what the testator has written may be admitted, but no evidence is admissible which, in its nature and effect, is applicable to the purpose of showing merely *what he intended to have written*, such alleged intention being different from *the expressed language of the will*.

Jarmin, in his able Treatise on Wills, 5. A. M. Ed. Vol. 1, page 708, declares the rule to be as follows:

> "As the law requires wills both of real and personal estate (with an inconsiderable exception) to be in writing, it cannot, consistently with this doctrine, permit parol evidence to be adduced, either to contradict, add to, or explain the contents of such will, and the principle of this rule evidently demands an inflexible adherence to it, even where the consequence is the par-

tial failure of the testator's disposition, for it would have been of little avail to require that a will *ab origine* should be in writing, or to fence a testator round with a guard of attesting witnesses, if, when the written instrument failed to make a full and explicit disclosure of his scheme of disposition, its deficiencies might be supplied, or its inaccuracies corrected from extrinsic sources. No principle connected with the law of wills, is more firmly established or more familiar in its application than this; and it seems to have been acted upon by the Judges, as well of early as of later times, with a cordiality and steadiness which shows how entirely it coincided with their own views. Indeed, it was rather to have been expected that judicial experience should have the effect of impressing a strong conviction of the evil of offering temptation to perjury."

Wigram on Wills, 2 Am. Ed., page 53.

"It is said (and correctly) that the statute, by requiring a will to be in writing, precludes a court of law from ascribing to a testator any intention which his written will does not express, and in effect makes the writing the only legitimate evidence of the testator's intention. No will is within the statute but that which is in writing, which is as much as to say that all that is effectual and to the purpose must be in writing, without seeking aid of words not written. * * Any evidence is admissible which, in its nature and effect, simply explains what the testator *has* written, but no evidence can be admissible which, in its nature or effect, is applicable to the purpose of showing merely what he *intended* to have written. In other words, the question in expounding a will, is not what the testator meant, as distinguished from what his words express, but simply, what is the meaning of the words?"

The above quotations are especially applicable to this case when it is borne in mind that the statute of Maryland of 1798, Chap. 101, in force in the District of Columbia, provides that all devises of real estate—

"Shall be in writing and signed by the party so devising the same, or by some other person in his pres-

> ence and by his express direction, and attested and subscribed to in the presence of said devisor, by three or four credible witnesses, or else they shall be utterly void and of no effect."

All the provisions of this statute were strictly complied with in the execution of the will before us, and the court is now asked to totally disregard the statute, and make a new and different disposition of the testator's estate from that plainly designated by him, accompanied with all the forms and solemnity required by the law of this District.

The Court of Appeals of Maryland in *Walston's Lessee* vs. *White*, 5 Md., 297, at page 304, says on this subject:

> "The rule is this: When the language of the testator is plain and unambiguous, such language must govern, and therefore extrinsic evidence is admissible to show that he meant something different from what his language imports; but any evidence is inadmissible, which, in its nature and effect, simply explains what the testator *has* written; 'in other words, the question in expounding a will is not what the testator meant, as distinguished from what his words express; but simply what is the meaning of his words? And extrinsic evidence, in aid of the exposition of his will, must be admissible, or inadmissible with reference to its bearing upon the issue which this question raises.'"

And in *Hawman* vs. *Thomas' Executor*, 44 Md., 30. This doctrine was re-affirmed. The Court says, page 43:

> "The law requires the will shall be in writing, which must express the testamentary purpose and wish of the testator; this need not be done in a formal or technical way, but it is necesssary that the intention of the testator shall be gathered from the face of the writing, it cannot be supplied by extrinsic proof. The only object and purpose for which such proof can be properly admitted, is not to show what the testator meant, as distinguished

from what his words express, but simply what is the meaning of his words."

It was argued below by the counsel for plaintiff in error that the court had the right to presume that the testator intended to devise land of which he was the owner and not land to which he had no title.

The Supreme Court of Iowa, in the case of Fitzpatrick vs. Fitzpatrick, 36 Iowa, 674, refused to admit parol evidence, offering to show that by mistake real estate was described in a will as the West ½ of the N. E. ¼ instead of the East ½ of the S. W. ¼ of a section of land, notwithstanding that the evidence offered tended to show that the testator owned no real estate except the East ½ of the S. W. ¼. The court after reviewing the principle cases on the subject, says, page 585:

> "It is alleged to be a case of mistake in the writing of the will, whereby a certain tract of land is described that did not belong to the testator, nor did she claim at any time to have an interest in the land described in the will. The description in the will is complete and perfect, describing a tract of land which answers perfectly the description. We are asked to disregard this description and hear parol evidence to show that the testator intended to describe another and different tract of land. Not that she intended another piece of land by the use of the words of the devise, but that she intended to use different words of description, and that through the mistake of the person writing the will, the words intended were not inserted, but other and different language was used" * * "we are asked" (page 650) "to presume that the writer intended to devise land of which she was the owner, and not that to which she had no title, or in which she had no interest. The cases, as we have seen, are abundant to the effect that extrinsic evidence of the testator's declared intentions cannot be admitted to correct a mistake in writing the will. And we have found no cases which will justify a court in presuming, upon the mere fact of a be-

quest, that the testator intended to assert his ownership of the thing bequeathed, and that such assertion should be considered as implied and taken as part of the description of the property devised."

This doctrine was re-affirmed in *Chambers* vs. *Watson*, 56 Iowa, 676.

The courts of Illinois have held the same doctrine.

The case of *Kurtz* vs. *Hibner*, 55 Ill., 514, involved the construction of certain devises in the will of John Hibner.

To his daughter, Elizabeth, he gave "the west half of the southwest quarter of *section 32*, township 35, range 10, containing eighty acres, more or less." * *

To his son, James Kurtz, he gave "the south half of the east half of the south quarter, section 31 in township 35, range 10, containing forty acres, more or less."

Parol evidence was offered to locate the land intended to be given to Elizabeth in section 33, and not in 32, as described in the will, and to locate that given James as the south half of the east half of the southeast quarter of section 32, and not in section 31, as stated in the will.

The court, in rejecting the offer, says, page 519:

"The law requires that all wills of lands shall be in writing, and extrinsic evidence is never admissible to alter, detract from, or add to the terms of a will.

"To permit evidence, the effect of which would be to take from a will plain and unambiguous language and insert other language in lieu thereof, would violate the foregoing well-established rule. For the purpose of determining the object of a testator's bounty, or the subject of disposition, parol evidence may be received to enable the court to identify the person or thing intended. In this regard, the evidence afforded no aid to the court. The devise is certain both as to the object and subject. There are no two objects, no two subjects. * * The thing devised is certain and specific—section, township and range are given. The evidence offered, as to mistake in the section, would have

> made a new and different will. The description is full, certain and explicit. No doubt arises upon the reading of the will. Every mind is forced to the same conclusion that the land devised, the subject of disposition, is clearly, and without the slightest ambiguity, described. The language is not applicable to any other land. No entrinsic evidence then, is needed to identify the thing intended. The intention is manifest from the words of the will."

Again, in *Bishop* vs. *Morgan*, 82 Ills., 351, the court declined to admit parol evidence to show that a devise of "the southeast quarter of section number 10 * * containing 40 acres more or less," was intended to pass the southeast quarter (of *the northeast quarter*) of section numbered 10, and said, page 353:

> "It is plain there is nothing in this case to distinguish it in principle from *Kurtz* vs. *Hibner*, 55 Ills., 514, unless it be, indeed, the use of the words, 'containing 40 acres more or less,' in the description of the land devised. It is contended that this is evidence, on the face of the will, of a mistake, or that the words, on their face, contain two descriptions, one saying it is 'the southeast quarter' of the section mentioned, and the other saying it is 'a 40 acre tract,' lying in that section. We know of no adjudicated cases or elementary rule by which the use of the words 'containing 40 acres more or less,' can be allowed to effect or modify a description, such as 'the southeast quarter of said section,' which is clear and certain as to location and boundaries."

The same doctrine has been held by the Supreme Court of Connecticut.

In the case of *Dunham* vs. *Averill*, 45 Conn., 61, a testator provided a legacy for "The American and Foreign Bible Society." There was a corporation of that name under the management of the Baptist denomination. There was another and older corporation, named "The American Bible

Society," under the management of Congregationalists. The court refused evidence offered to show that the testator was a Congregationalist and had no especial interest with the Baptists. That he had told the scrivener, while drawing the will, that he wished to give his money to the Bible Society sustained by the Congregationalists and Presbyterians. That he was not sure of its corporate name, but believed it was "The American and Foreign Bible Society."

The Court says, page 68:

> "Persons who desire to make testamentary disposition of their estates other than that made for them by the statutes of distribution are required to call about themselves several attesting witnesses and to speak and act in accordance with precise and solemn forms, in order to guard against the extrance of fraud, deception or mistake into their work, and the courts supporting the statute have persistently and with a good degree of unanimity refused admission to parol evidence of the kind offered in this case, either to contradict, add to, take from, or explain the contents of a will so clear as to the legatee, as is the one before us, even when the failure of an intended disposition is the result of such refusal."

The Courts of Indiana hold the same doctrine. In the case of *Judy* vs. *Gilbert*, 77 Indiana, 96, a petition was filed to correct a will. The petition set forth that the testator had borrowed money from his wife to purchase the northeast quarter of the southeast quarter of a certain section of land, agreeing to devise the same to her for life with remainder to her children; that he executed his will, intending to conform to that agreement, but by mistake the will described the land as the "northeast quarter of the southwest quarter," and that he owned no other land than the lot mis-described. The Court held that parol evidence of such facts were inadmissible.

Says the Court, page 99:

"There is no mistake upon the face of the will which is here the subject of investigation. There is no latent ambiguity. The property devised is accurately described. The claim is not that there is an inaccurate description apparent upon the face of the will, but that the testator ought to have described some other property. The Court is asked to admit parol evidence to show, that, although the testator described with perfect accuracy one parcel of land, he meant another. The bare statement of appellants position exposes its hostility to fundameatal and salutory principles of jurisprudence."

The Supreme court of Wisconsin, in *Sherwood* vs. *Sherwood*, 45 Wis., 357, had this question before it,

A petition was filed to correct a will and remove cloud from title.

The complainant alleged that the testator, by his will, left lot 10 in block 20 to his mother, the plaintiff, he being at the time of making his will the owner of said lot. That in drawing the will there was a mistake made in drafting and drawing the same; that in describing said lot 10, block 20, the same was described as lot 9, block 20, being the lot owned by the plaintiff. That no other mention or description of lot 10, or of any lot of land in said block 20 was made in the will; that the plaintiff, herself, owned lot 9, and had owned the same before the death of the testator, and at the time of making the will and ever since the death of her son had been in possession of said lot 10, and that the mistake had but recently been discovered. The complaint was demurred to, and the demurrer sustained. The court rejecting the extrinsic evidence offered to alter the will, declaring, page 363, (adopting the rule laid down by Wigwam):

"The judgment of a court in expounding a will must be simply *declaratory* of what is *in* the will."

The Supreme Court of New Jersey, in *Griscom* vs. *Evens*, 11 Vroome, 402 (406), says:

> "By the statute, a writing is made indispensible to the existence of a will, and what has been written cannot be added to, detracted from, or altered by extrinsic evidence. The functions of the court are to ascertain the intention of the testator from the language of the will. Extrinsic evidence may be resorted to, which, in its nature and effect, is simply explanatory of what the testator has written, but no evidence can be received for the purpose of showing what he intended to have written. In every case of a controverted construction the sole question is *non quod voluit sed quod dixit*." * * "The testator's intention must ultimately be determined from the language of the instrument, as explained by such extrinsic evidence, and no proof, however conclusive in its nature, can be admitted with a view of setting up an intention inconsistent with the writing itself."

In the case of *Tucker* vs. *Seaman's Aid Society*, 7 Metcalf (Mass.), 188, the testator gave legacy to "The Seaman's Aid Society" in the city of Boston. Another society denominated "The Seaman's Friend Society" claimed the legacy, and offered evidence to show that the testator had no knowledge of the society existence of the named, but did know of the society claiming, and was deeply interested in its object—had contributed to its funds and frequently expressed his determination to give it a legacy; that the name was written improperly through mistake of and at suggestion of scrivener, &c. The court held the evidence inadmissible, and that "the Seaman's Aid Society" was entitled to the legacy.

The case of *Hanner, Jr.*, vs. *Molton*, decided in the Circuit Court of the Northern District of Texas, January Term, 1885, and reported in Federal Reporter, March 17th, 1885, reviews the question of the admission of extrinsic evidence

in the construction of wills, and the opinion of Mr. Justice Woods is an able and complete epitome of the accepted doctrine on this subject.

The conclusions arrived at by the Judge may be stated in the following extract from the opinion; page 7:

> "The writing, if it be a contract, may be read in the light of the surrounding circumstances in order more perfectly to understand the meaning of the parties. If it be a will, the circumstances under which the testator executed it; or the state of his property, his family, and the like may be shown in order to throw light upon his intention, as expressed by the words used in the will, 1 Greenl. Ev. 277; 2 Powell, Dev. pp. 5, 11; rule 8; *Hunt* vs. *White*, 24 Tex., 643. But in both cases, as the writing is the only outward and visible expression of the meaning of the party or parties to it, no other words are to be added to it or substituted for those used. 'The duty of the court in such cases is to ascertain, not what the parties have secretly intended as contra distinguished from what their words expressed, but what is the meaning of the words they have used.'"

In leaving this point we cannot too strongly protest against the doctrine advocated by the plaintiff in error. The unscrupulous energy of disappointed expectants in contesting wills is well known, and the courts cannot be too careful in opening a new door for the admission of perjury to tamper with bequeaths and devises. Even if it be admitted, as a matter of fact, that in this case a mistake was actually made, and that by admitting the evidence offered the real purpose of the testator would be carried out, to do so would be to assert a principle which would more frequently defeat than promote the purposes of testators.

II.

Even should the Court find the extrinsic testimony offered to have been admissible, the plaintiff was not entitled to re-

cover upon the case presented, and the instruction to the jury to that effect was correct.

The theory of the action of ejectment is that the defendant has wrongfully deprived the plaintiff of the possession of the premises claimed, and is wrongfully detaining the same. The only rule therefore consistent with that theory is that the plaintiff must show, not only his own right, but that the defendant was in possession at the commencement of the suit either by himself or by his tenant.

Section 809 Revised Stats. U. S. for D. C., provides that all fictions in actions of ejectment shall be abolished:

> "And all actions for the recovery of real estate shall be commenced in the name of the real party in interest and against the party *claiming to own or be possessed thereof*."

The rule of the Supreme Court of the District of Columbia, General Rule No. 12, provides that the suit shall be—

> "Against the party claiming to own or be possessed of the land at the commencement of the suit."

Thus it will be seen that the act of Congress relating to actions of this nature in the District, and the rule of Court framed in conformity with the act, both provide that the suit shall be against the party *claiming to own or claiming to be possessed of the land*" at the commencement of the suit.

The declaration filed, (Record page 1), alleges that the plaintiff was on March 22d, 1877, *possessed* of the land in question, and was unlawfully ejected by the defendant *who unjustly detains the same*. To this the defendant pleaded, "Not Guilty." (Record page 2).

Here, then, is a direct and positive denial of the acts charged as tortious. It is a denial that the plaintiff was unlawfully ejected by the defendant, and also that the defend-

ant "unjustly detains the same." According to every rule of pleading, this puts the plaintiff upon the proof of his declaration.

Malone on Real Property Trials, page 83, says:

> "The plaintiff, in an action to try the right to the possession of land, takes upon himself, in the first instance, the burden to show at least a *prima facia* case, before the defendant is required to show any testimony whatever. The defendant having placed himself right in the court, so far as the pleadings are concerned, can sit down and *wait* for the plaintiff to show a cause of action and such a state of facts which, if not contradicted, will entitle the plaintiff to a verdict and judgment."

And again, page 85:

> "But before the plaintiff offers his title-papers it must appear that the proper *party defendants* are before the court. Under the old practice, even with the 'consent rule,' the plaintiff was required to show the defendant in po-session at the time of the service of the declaration." * * "It is, therefore, with the exceptions made in the practice and by statute, an indispensable part of the plaintiff's case to show the defendant in possession of some part of the disputed land at the time of bringing suit. If the plaintiff fails in proving the defendant in possession at the time of bringing suit, he will be non-suited."

As there is no exception made by statute or by the practice of our courts which would dispense with the general rule of proof applying to cases of this nature, the general rule should prevail and the plaintiff be required to make out his case in all particulars before he is entitled to a verdict.

The bill of exceptions states that the substance and tendency of all the testimony on the part of the plaintiff is set forth in the same. (Record, 12.)

As will appear, no attempt was made at the trial below to connect the defendant with the possession of the property in dispute, nor was there any circumstances presented which conduced in the slightest degree to establish the fact of his being in possession, or that in the language of the statute, "he claimed to own or to be possessed of the same," or that the plaintiff had a legal title to the property at that time of the alleged unlawful ejectment in 1877, the plaintiff resting with the deed to Patch, Dec. 8th, 1875. (Record, 10).

The text books and authorities agree that where the title of the plaintiff is controverted under the general issue he must prove—

(1). That he had a legal estate in the premises at the time time laid in the declaration.

(2). That the defendant or those claiming under him were in possession at the time the declaration was served.

Under this rule the plaintiff in error showed no case that will entitle him to recover:

2 Greenleaf Ev., Sec. 304;
Tyler on Ejectment, (Ed., 1870,) 472;
Malone on Real Property Trials, 83–85;
Pope vs. *Pendergast*, 1 A. K. Marshall, 122;
Owen vs. *Fowler*, 24 Cal., 195;
Stevens vs. *Griffith*, 3 Vermont, 448;
Cooper vs. *Smith*, 9 S. & R., 26;
Hestres vs. *Brennan*, 38 Cal., 389.

WALTER D. DAVIDGE,
J. HOLDSWORTH GORDON,
Counsel for the Defendant in Error.

117-218

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

JOHN PATCH, *Plaintiff in Error,*

vs.

ELIAS E. WHITE, *Defendant in Error.*

No. 58.

Rehearing.

BRIEF FOR DEFENDANT IN ERROR.

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BRIEF FOR DEFENDANT IN ERROR.

The question presented in this case is whether a clear and precise devise can be contradicted, and the heir-at-law disinherited by parol evidence.

The will was made on the 17th of September, 1832; more than fifty-three years ago.

The devise which it is proposed to contradict is in these words:

> "I bequeath and give to my dearly beloved brother, Henry Walker, forever, lot numbered six in square four hundred and three, together with the improvements thereon erected and appurtenances thereto belonging."

There is no shadow of ambiguity in this devise. It is as absolutely certain as words can make it in respect, first, of

object, secondly, of subject, and lastly of estate. As the devise is certain in itself so no ambiguity is thrown upon its meaning by any portion of the will. No one reading the whole will can have the slightest doubt that what the testator devised in writing was the above mentioned lot; nothing more nor less.

The error assigned is that the Court below refused to admit parol evidence to expunge the subject of the devise as written, that is, lot six, in square four hundred and three, and to substitute in lieu of the same, lot three, in square four hundred and six.

If the Court below had ruled otherwise, it would have allowed not only a fixed and certain designation of property to be changed to a designation essentially different as to both lot and square, but the property, represented by the designation in the will, to be changed to other property conceded to be essentially different from that devised. The subject of the devise in the will is situated on 9th street, between I and K, and the subject proposed to be substituted on E street, between 8th and 9th.

Can the subject of this devise be thus contradicted by means of parol evidence?

By the law of this District all wills are required to be delivered to the Register of Wills and recorded.

Kilty's Laws, Act of 1798. Ch. 101, Sub. ch 2, ss. 1 and 3, and Sub. Ch. 15, S. 9. R. S. D. C. S., 929.

The purpose of this is to give notice. Any purchaser is as much bound by a recorded will as a recorded deed.

The rule of evidence excluding proof of intention, dehors the will, thus enters into the registration system of this District.

If the subject of a devise could be contradicted, or varied by parol evidence, it would be of little avail to require the will to be recorded. Purchasers and all parties would have to deal with the property, not according to the face of the

will, but according to such intention as might in the indefinite future and through the agency of parol evidence be interpolated, however much at variance with the will itself.

The evidence offered was properly rejected, first, because it tended to the disherison of the heir-at-law, and secondly, because it tended to contradict the plain language of the will.

I. As to the first. The testator left an only child, his heir-at-law.

It is an established canon of interpretation that the heir-at-law, or those standing in his place, can not be disinherited except by express devise or implication so inevitable that an intention to the contrary cannot be supposed. The heir takes by nature and law, and can only be disinherited by some explicit affirmative gift.

3 Jarman, 5th Am. Ed., 704; 1 Powell on Devises, 199; *Berry* vs. *Berry*, 1 Har. and John, 417; *Cresswell* vs. *Lawson*, 7 G. & J., 227, *Ridgley* vs. *Bond*, 18 Md., 437; *Saylor* vs. *Plaine*, 31 Md., 158; *Lingan* vs. *Carroll*, 3 H. & McH., 333; *Allen* vs. *Allen*, 18 How., 385: *Finley* vs. *King*, 3 Pet., 379; *French* vs. *McIlhenny*, 2 Binn., 20; Doe dem. Spearing 6, T., R. 611; *Heyden* vs. *Soughton*, 5 Pick., 536; *Roosevelt* vs. *Heirs of Felton*, 7 Carr., 79, 187.

In the present case there is no devise by express words or implication which takes the lot in suit from the heir-at-law. On the contrary the devise as made leaves intact the right of the heir-at-law to the lot in suit, and it is sought to disinherit him by parol evidence, taking from him what passed as the will is written, and substituting it in lieu of a different subject disposed of by the will.

II. As to the second.

What the testator has written is plain and explicit. There is no shadow of doubt about the writing,—the only

It is not possible to distinguish between *Miller* vs. *Travers*, and the present case. In the former, as here, the testator gave, as alleged, what he did not own. The answer was, and is here, that the only thing given was the thing written in the will. To expunge that thing and substitute something else, was to make a new will. To expunge was to make a blank, in which case the devise would be void for uncertainty.

See opinion in *Miller* vs. *Travers*.
Baylies vs. *Att'y Gen.*, 2 Atk., 239;
Ulrich vs. *Littlefield*, Id., 372;
Taylor vs. *Richardson*, 2 Drew, 16;
1 Jarman, 761;
Hunt vs. *Hert*, 3 Bro. C. C., 311.

In the present case it is contended that the number of the lot should be expunged and a new number inserted, that the number of the square should be likewise expunged and a new number inserted, and that the same process should be applied to improvements and appurtenances, making them applicable to a different subject from that designated. What, then, is left of the devise as written? In every element that enters into it and gives it meaning it is changed.

2. It is not denied that extrinsic evidence may be resorted to which, in its nature and effect, is simply explanatory of what the testator has written, but no evidence can be received for the purpose of showing what he intended to have written (Wigram, S. 9). In every case of a controverted construction the sole question is *non quod voluit sed quod dixit*.

The office of the extrinsic evidence is to preserve, not to defeat, the written will. Its effect is not to contradict or

vary the language used, but merely to show the sense in which the testator used it.

2 Taylor on Ev., S. 1085;
Shore vs. *Wilson*, 9 Cl. & Fin., 355.

The evidence is admitted because, in the words of Lord Coke, it "stands well with the will."

In this case there is no pretence of any obscurity in the language of the devise. The subject of the devise is described with absolute certainty. The testator has used words having a legal meaning, and must be presumed to have used them in the legal sense. Evidence of actual intention, irrespective of the language of the will is always inadmissible.

1 Jarman, 726, note 8 and cases cited;
Allen vs. *Allen*, 18 How., 385;
Mackie vs. *Story*, 93 U. S., 589.

3. Undoubtedly, the Court may, in the interpretation of a will, put itself in the place of a testator by looking at the state of his property and the circumstances by which he was surrounded when he made his will.

But this, again, is to aid and not to destroy the written will, and make a parol will.

In *Allen* vs. *Allen* (*supra*), it was sought, by evidence of this kind, to vary the language of the will, but this Court said—

> "*The evidence cannot be heard to show a different intention in the testator from that which this will discloses.*"
>
> 18 How., 393.
>
> So in *Weatherhead* vs. *Barksdale*, 11 How., 357.

So, the evidence must always stand well with the will.

1 Jarman, 734, note 9, and cases cited.

4. It is attempted to bring this case within the application of the maxim *falsa demonstratio non nocet.*

It is conceded that when a description of the subject of a devise is made up of several particulars, some of which are true and others false, if the true particulars describe the subject with sufficient legal certainty, the untrue particulars will be rejected.

2 Jarman, 390.

This is one of Lord Bacon's maxims, and qualified by another: "*Non accipi debent verba in demonstrationem falsam quae competant in limitationem veram.*"

Both these maxims uphold the language of the will; the first holding that particulars may be rejected because other particulars in the same devise describe the subject; the other that the testator intended that the subject must respond to all the particulars of the description. Whether the devise belongs to one category or the other, is a mere matter of construction. Neither gives the slightest countenance to what is attempted here; that is, to expunge the whole description and substitute another and different thing in the place of that described. What particular of the subject, as described, is applicable to the lot in suit?

The number of the lot is not applicable, nor the number of the square, nor the improvements or appurtenances, for they are declared to be thereon and thereto in respect of the lot named in the will.

Then what particular of description is left?

The counsel for the plaintiff in error maintain that the designation of the lot may be rejected, and the last numeral of 403, the number of the square as described, may likewise be rejected, and that by this process the devise will be made to read a lot in the range of squares running from 400 to 410. But the difficulty in the way is that the testator wrote specifically what he intended. He did not write a

lot owned by him in the above range, but he wrote in plain words lot six in square four hundred and three. It is evident that the ingenious process suggested will make a new devise by parol. To change the numerical designation of the subject is to change the subject. This process of changing part of a numerical designation might with equal success be applied to all the words in a will or even the letters comprising such words. They might be transposed and satisfactorily re-adjusted and a new will made containing all the words or all the letters in the written will.

But what would become of the intention of the testator? What would become of the statute against fraud and perjury? There has been much difference of opinion as to whether, where there are several particulars of description, language may be rejected as a false demonstration or must be held an essential element of the description. *Kirtz* vs. *Hibner*, 55 Ill., 514, cited in the former brief, p. 12, was severely criticised by Judge Redfield, because words were held an essential part of the description, instead of being rejected as *falsa demonstratio*.

Am. Law Reg., (U. S.,) Vol. 10, p. 97.

The decision was defended by Judge CATON, p. 353, and was subsequently affirmed in *Bishop* vs. *Morgan*, 80 Ill., 357.

In *Griscom* vs. *Evens*, 11 Vroom, 402, the words of the devise were also held restrictive.

Whether the language of a devise is to be held restrictive or not, neither Judge Redfield nor any other authority has ever held that the whole devise can be expunged and a new subject substituted, as proposed here.

It is urged by counsel that this devise is one of several particulars, to which the maxim *falsa demonstratio non nocet* is applicable. It has been shown that, conceding the

devise to be such, all the particulars are wrong. If the number of the lot and that of the square are stricken out, there is nothing left. In that respect it is exactly similar to *Miller* v. *Travers*, and other cases cited in the brief already filed.

So far, however, from the devise coming within the application of the maxim of *falsa demonstratio*, it belongs not to that, but the second maxim above mentioned. Here the testator has defined and identified the subject for himself. He has left nothing to judicial interpretation. He has said, with as much precision as was ever stated in any writing, exactly what he wanted. When a Court can say that a testator has done this, it will execute what is written, and not be governed by any presumption to the contrary, however strong. The language of this devise is common in all deeds and wills of land. It mentions a lot, and then proceeds to define what lot.

West vs. *Lawday*, 11 H. of L., Cas. 375.
Drew vs. *Drew*, 8 Fost., 489.
Gricom vs. *Evens*, 11 Vroom., 402.

5. It is further urged by the other side that the introductory clause of the will shows an intention on the part of the testator to dispose of all his property.

The question is what he did. No principle is better settled than that such a clause has not the effect of disinheriting the heir, unless the intention is carried out by a devise which expressly or by necessary implication has that effect. In such case the rule *quod voluit non dixit* is held to apply.

An estate given cannot be enlarged by such a clause. Here the estate as given preserves the right of the heir to the property in suit, and it is proposed to destroy that right

by obliterating the subject itself of the devise and substituting a different subject.

Beall vs. *Holmes*, 6 H. & J., 206.
Preston vs. *Evans*, 56 Md., 488;
Hammond vs. *Hammond*, 8 G. & J., 441.
Dougherty vs. *Monett*, 5 G & J., 462.

6. It is further urged that some color is given to the pretension of the plaintiff in error, by the residuary clause. On the contrary, that clause, if examined, will be found to be utterly fatal to the pretension. The testator proposes to dispose of the balance of his real estate, and states, not positively, but his belief, as to what such balance consists of, enumerating a number of lots, and gives such balance to the primary object of the will,—his infant son and heir-at-law.

What then is the effect of this clause? The testator, speaking of the balance of his real estate, by necessary implication, re-affirms the preceding specific devises. He says that his real estate, less the preceding devises, shall go to his son and heir-at-law.

The only deductions to be made from his real estate are the preceding devises. He proceeds to enumerate the lots comprising the balance, but he is careful to say "it is believed." So the son and heir-at-law may have all, not specifically disposed of by the preceding devises, and not be restricted to the enumeration.

It is thus demonstrable that there is not an intestacy as to any of the property, but that all of it is includedin the will; part specifically devised, and the residue given to the son and heir-at-law.

Hence the lot in suit passed under the devise of the residue, although the son and heir-at-law, would, by law, be remitted to the better title,—that by descent.

It is said above that the residuary clause reaffirmed the preceding devises. It also did much more. It recog.

nized the fact that the testator had, or might have, other property not specifically mentioned.

There was no attempt to show, at the trial below, that the lots specifically devised, substituting the lot in suit for that devised to Henry Walker, comprehended the whole estate of the testator.

The whole question below was whether upon a testator assuming the right to devise property, and actually devising it in the most precise terms, the devise was to be nullified and a new devise made, because, after the lapse of fifty years, there was evidence to prove that the testator did not own the subject devised, and did own an essentially different subject.

Such a pretension involves the double process; first, of obliterating what is in the will, and then of substituting another subject, whose substitution rests upon no other ground than that the testator owned it, and the numerical designation is not many numbers removed from the designation in the will.

If, among the property owned by the testator, and not specifically mentioned in his will, there should be found another lot more nearly resembling in the number of lot and square the designation of the devise in question, it would follow that that property ought to be the property substituted, and thus there would be another will, and so new wills might originate from time to time according to the varying conditions of the oral evidence.

III. An examination of the cases cited in the brief of the plaintiff in error, will show their utter dissimilarity to the case now before the Court, and will also show that the decisions in such as are entitled to weight, have been made by the courts through the application of the rule laid down by Lord Tindal in *Miller* vs. *Travers*, *falsa demonstratio non*

nocet, which rule, as above shown, cannot be applied in this case.

The plaintiff in error, in support of his claim for the admission of the testimony offered, cites from the case of *Blake* vs. *Hawkins* (98 U. S., 324), wherein the Court says:

> "The interpreter may place himself in the position occupied by the testator when he made the will, and from that stand point discover what was intended."

This is only the reiteration of a well settled doctrine, when accompanied by the explanatory and equally well settled axiom, that the interpreter can then only arrive at the intention *from the expressed language of the will, as explained and enlightened by such information and as seen from such standpoint.* That nothing more was intended will appear from reference to the cases cited by Mr. Justice STRONG in support of the position taken. For, in *Brown* vs. *Thomas*, 15 Mass., 400 (this being one of the cases referred to), the Court declared:

> "It is a well settled rule, that parol evidence cannot be received to alter or control what the testator *has expressed, or to show by his declarations or otherwise that he intended something different from what the language imports.*"

Thus it will be seen that this Court, adopting the *dicta* of the Massachusetts case, fully sustains the position taken by the defendant in error.

And so, also, Wigram declares in the very citation used by the plaintiff in error that this is the true doctrine, for in speaking of the admission of extrinsic evidence in such case he says, the extrinsic facts offered can only be admitted when it is shown that a knowledge of them "can in any way be made ancillary to the right *interpretation of the*

"The question is upon the words of the will, to wit: I give to Katherine, my wife, all the profits of my houses and lands, lying and being in the Parish of Billing and L, at a certain street called Brooke street; and the jury found that there was not any village or hamlet in said county called Billing, and that the land supposed to be devised lieth in Byrling street; no man's verbal averment shall be taken or admitted to be contrary to the will, which is expressly set out in the will. If I have two Thomases to my sons, and give it to Thomas, it shall be intended to my youngest son, because my eldest son should have it by descent; the will was held by all the Court to be good."

Here the will was held to be good by all the Court, and there is nothing in the report of the case to justify the assertion of the brief of plaintiff in error that the Court "held a good devise of lands in Billing street." On the contrary the report says: "No man's verbal averment shall be taken, or admitted to be contrary to the will, which is expressly set out in the will;" which, if there is any meaning in plain English, declares that no extrinsic evidence is admissible to show intention ("will") contrary to the *expressed language of the will*.

So, also, the case of *Wilkins* vs. *Kerney*, (1808) 9 East., 366. Here the Court simply held that the description "leasehold estates" being thrown out under the rule in the second class of cases named by Lord Tindal, nevertheless, being "*described by its local name and parts*," the devise would pass, the freehold answering the specific description.

So, also, the case of *Humphreys* vs. *Roberts*. Here the testator, after devising certain property in High street in Holywell, in the county of Flint, wherein his mother lived, &c., devised as follows: "And all and every my buildings and hereditaments *in the same street*, I give and devise," &c. The Court held that while the testator had only one house on High street, that as he had behind that street two houses

fronting on a lane through which there was no thoroughfare, *the only entrance being by way of High street*, and the Court having sufficient description in the location in the town of Holywell, in the county of Flint, coupled with the fact that the houses claimed could *only be reached through High street*, declared the devise to cover the houses claimed, and upon this latter fact the case turned, as is shown by the *dicta* of the justices sitting, being clearly an application of he doctrine *falso demonstratio non nocet*.

In the case of *Pentecost* vs. *Ley*, (1820,) 2 Jacob & Walker, 207, (another cited case) the testator gave to one legatee 700 £ of *long annuities*—to another, 200 £ of long annuities, and to another 100 £ the balance of the said sum of 1000 £ long annuities standing in her name or in trust for her. At the time of her death she had in trustees 1000 £ 3 pr. ct. *reduced annuities*. The court held that as she had left 1000 £ and there was nothing answering the description set out in the will *so nearly* as the 1000 £ long annuities, that sum should pass—still clearly an application of the same rule.

The case of *Moseley* vs. *Massey*, comes under the same rule—the Court holding that, notwithstanding the mis-description enough appeared upon the face of the will, which also described the estates as *formerly belonging to his uncle*, to pass the estates claimed.

So in *Dowsett* vs. *Sweet* (1753), Ambler 175. The bequest was to John and Benedict, sons of John Sweet. John Sweet had *only two sons*, and the same rule applied.

So in *Smith* vs. *Coney*. The bequest was to the Reverend Charles Smith, of Stapleford, Tawney, in the County of Essex, Clerk. There was no Charles Smith, but the plaintiff *reverend Richard Smith*, was at date of making will *incumbent of Stapleford Tawney*. Here, then, was a plain case for application of the rule "Reverend ——— Smith, of Stapleford, Tawney."

Also in *Bradwin* vs. *Harpur*, (1759), Ambler, 374. The personal estate of testatrix was to be put out at interest and interest to be paid her neice, Mary Bradwin for life, and after her death one moiety to be paid to the said *Mary Bradwin's grandchildren, the children of her daughter, Mary*, at their age of 21, and the other moiety to be paid to Anne, the daughter of her said niece, Mary Bradwin. Mary Bradwin, the neice, had two children, Mary, who was never married, and Anne who did marry and died in life time of testatrix, before making of will, leaving two children. The Court decreed payment of one half to Mary and the other half to Anne's children.

The reporter incorporates in the report of the case, as follows:

"I was of counsel for the plaintiff, and cited *Beaumont* vs. *Fell*, 2 Wms., and *Doesett* vs. *Sweet*, 3 July, 1753, the former of which was much stronger than the present case, as the devisee there was described by her name only, *but here is a sufficient certain description; independent of that part which is mistaken, viz: grand-children and daughter* * * *If there is a certain description and a further description is added, it is immaterial whether the additional desciption be true or false*," and we may fairly presume the case was decided by the Master of the Rolls upon just the same grounds as set forth by Ambler, which coincides with the position taken by the defendant in error.

So, in the Missionary Society's appeal, the will did not fully describe either of the complainants, but *partially described both*, and extrinsic evidence was admitted to relieve the ambiguity. And so in all the American cases cited by the plaintiff in error, there was something, after the misdescription was eradicated, to point with definiteness to the object or subject of the devise, as will clearly appear from an examination of the cases. In none of them was it ne-

cessary to interpolate a new devise or to *wholly* supply the description *outside of the language of the will itself.*

Now, does the case at bar meet the requirement of the rule? Surely it does not. There is no reason for the introduction of extrinsic evidence in this case. None can be offered which would in any way tend to throw light upon the *language of the testator.* The testator's intention must be determined from the language of the instrument, and no proof, however conclusive in its nature, can be admitted with a view of setting up an intention inconsistent with the writing itself. (11 Vrom, 406.)

How aptly the language of the Court in *Judy* vs. *Gilbert*, 77 Indiana, 96, applies to this case:

> "There is no mistake on the face of the will, which is here the subject of investigation. There is no latent ambiguity. The property devised is accurately described. The claim is not that there is an inaccurate description apparent upon the face of the will, but that the testator ought to have described some other property. The Court is asked to admit parol evidence to show that, although the testator described with perfect accuracy one parcel of land, he meant another. The bare statement of the appellant's position exposes its hostility to fundamental and salutary principles of jurisprudence."

1. It was earnestly insisted at the former hearing, by counsel for plaintiff in error, that the Court had the right to presume that the testator intended to devise lands of which he was the owner, and not land to which he had no title. In reply to this argument, we invite the attention of the Court to the case of *Fitzpatrick* vs. *Fitzpatrick*, 36 Iowa, 674, cited on our original brief, when the same argument was made and its fallacy exposed by the Court. Also *Sherwood* vs. *Sherwood*, 45 Wis., 357, and other cases cited, on original brief, from page 11-15.

IV. In conclusion it is submitted that this case is in substance as follows:

In a will fifty years old there is a devise in the most precise and explicit terms, and it is claimed, in behalf of the plaintiff in error, that he ought to be allowed to contradict that devise. The ground of this claim is that the testator did not own the subject of the devise, and did own another and different subject, which it is proposed to substitute in place of the subject devised. If this is done, it is plain that a new will is made by oral averment, and indeed worse than that, by oral *argument;* for it will be observed that the oral evidence tending to show that the testator did not own, is not direct evidence that he did not intend to devise as he has written, but at best evidence from which, if true, the want of such intention may be argued. Thus the claim is broadly made, that wherever some evidence can be presented from which it may be argued that a testator did not intend what he has written, a party claiming under the devise as written, can be compelled to litigate such evidence. To-day the argument is that the testator did not intend to devise what he did not own. To-morrow there will be another argument quite as plausible until exploded.

Now, the answer to all this is, that a defendant may stand upon the terms of the will, because the statute denounces every attempt to establish an oral will, against the written devise, as a fraud and all evidence adduced in support of such claim as perjury.

As to jurisdiction of courts of equity in England to correct mistakes in wills, see 1 Story Eq. Jur., §§ 179, 180, 180*a*, 180*b*, 181. In America the jurisdiction is confined to construing wills as made. Id. 180*a*.

WALTER D. DAVIDGE,
J. HOLDSWORTH GORDON,
Counsel for Defendant in Error.

117-20

Supreme Court District of Columbia.

APRIL TERM, 1882.

FROM 1ST. MACKEY 468.

JOHN PATCH,
vs.
ELIAS E. WHITE.

THE CASE is stated in the opinion.

R. T. MERRICK and CALDERON CARLISLE for plaintiffs.

WALTER D. DAVIDGE and GORDON & GORDON for defendants.

Mr. Justice HAGNER delivered the opinion of the Court.

This is an action of ejectment instituted by Patch against White to recover two undivided third parts of lot No. 3, in square 406, in the city of Washington. At the trial, the plaintiff, to maintain his action, offered in evidence a deed to himself in 1873 from Brereton, one from the heirs of Sewell to Brereton in 1851, and a deed to Sewell from Henry Walker, bearing date 1842. Each of these deeds purported to convey the entire title to lot No. 3. To prove title to the property in Henry Walker, the plaintiff then offered in evidence the will of James Walker, dated September 17, 1832, and duly admitted to probate. In this will, after a devise of one-third of his real estate to his widow for life, with a remainder to his infant son, James Walker, the testator devised the lot of ground in controversy as follows:

"I bequeath and give to my dearly beloved brother,

Henry Walker, forever, lot No. 6, in square 403, to gether with the improvements thereon erected and appurtenances thereto belonging."

The testator did not own the lot herein described, but the plaintiff offered evidence which he insisted, if admitted, would enable the court to say that this clause should be considered as in fact a devise of lot No. 3 in square 406. The parol evidence that was proposed to be given was, first, that the testator, James Walker, intended to leave all his land and everything he had to his brothers and sisters; secondly, that he did not own lot 6 in square 403, and that he did own lot 3 in square 406, which was in the same general system of lots, all the four hundred series running down in the same straight line through that part of the city; that the lot designated in the will, had no improvements upon it, whereas lot 3 in square 406, mentioned in the declaration, was improved (and the lot devised is, in the clause just quoted, described as an improved lot.) He then offered to prove that since the will was admitted to probate, Mrs. Walker, who had a life estate in one-third of all the property, had continued to draw one-third of the rents, issues and profits of the lot named in the declaration, that is to say, of lot 3 in square 406, and that the guardian of Henry Walker, during his minority, had drawn the other two-thirds of the rents of that lot, and that all the beneficiaries, the people named in the will had acquiesced in this, going to show the proper reading of that clause, as understood by those directly interested.

The question is, whether this evidence is admissible or not. It is not improbable that this may have been a case of misdescription through a blunder of the testator, or his scrivener, confusing the numbers of the lot and the square by a sort of jingle. He

seems originally in his description of his land to have made other blunders in the will. Thus, he gave his son, James Walker, "lot number 22, in square number three two hundred and twenty, fifty-two." This was a very strange blunder; in fact, he seems to have been a man very likely to blunder, but it is to be observed that this last one he corrected, and it may be argued that he would have corrected the first one if he had made it as well as the last, and that he might have intended to buy this piece of land before he died. The difficulty in these cases arises from the application of the rules governing the subject, the rules themselves being pretty plain. And, first, it is to be observed that this is not a suit seeking the aid of words not written. At the same time, however, a court of law, though precluded from ascribing to the testator any intention not expressed in his will, admit their obligation to give effect to every intention which the will, properly expounded, contains. The answer, therefore, to the question above proposed—enjoined as well as sanctioned by the general principles above mentioned—must be, that any evidence is admissible which, in its nature and effect, merely explained what the testator has written; but no evidence can be admissible which, in its nature or effect, is applicable to the purpose of showing merely what he intended to have written."

The case of Walton against White, in 5 Maryland, page 297, was a case of a devise of lands which were described as being "on the south side of Beaver Dam Branch," and the court says: "The question in expounding a will is not what the testator meant, as distinguished from what his words express, but simply what is the meaning of the words," and they admitted evidence to show the true location of the branch. The principle is confirmed, almost in the

same words, in the case of Hammond *v.* Hammond 55 Maryland, page 576. But, indeed, there is a perfect flood of cases, and multitudes were cited in the argument. We think, however, that the decision of the courts in the principal cases would not admit such testimony as is sought to be introduced here. Of citing cases there is no end, but it is to be observed that many of them are early cases before the statute, and are, therefore, not reliable. Such is the opinion of Redfield, Jarman, and other text-book writers; and among those cited as being before the statute are the cases from Ambler and from Coke's reports. All these are, therefore, not safe guides, because, unquestionably, the statute was intended to prevent the latitude of evidence which had hitherto prevailed. On page 115 (margin) of Wigram, it is said: "The principle (if any) upon which the excepted cases, taking them collectively, are founded, is by no means obvious;" and further down, on page 116, he says: "How can the statute, which makes a writing indispensable, be satisfied, if the thing which is the subject of disposition, or the person who claims the benefit of it is not described in that writing with certainty sufficient to enable the court, by the description in the writing, to determine their identity?" In the case of Beaumont against Fell (2 Pierre Williams), the Master of the Rolls, although he admitted the parol evidence, said: "If this had been a grant—nay, had it been a devise—of land, in equity, where 'the conscience of the heir may be affected,' in the language of the courts, 'if he shall insist upon the literal interpretation of a devise against the meaning well known to himself to have been intended by the testator.' Naturally, under such circumstances, a court of equity might be more inclined to consider the offer of such evidence than a court of law in a dry legal action like an ejectment, which is governed by technical rules. By the Statute

of Maryland of 1798, ch. 101, all devises of any land, &c., shall be in writing, signed by the party devising the same, or by some other person in his presence, and by his express direction, and attested and subscribed to in the presence of the testator by three or four credible witnesses, or else it shall be utterly void, and of none effect. This clause is a literal transcript of the provision in the Statute of Frauds and Perjuries, 29 Charles II, ch. 3. Now, what was the state of the law before this statute? In Wigram on Wills, page 5, authors' edition, it is thus laid down: "It was holden before the statute that parol evidence was, in certain cases, admissible to determine the person or thing intended, where the description in the instrument was insufficient for that purpose; as in a devise to A B, where there were two persons of the same name, or a devise of the manor of Dale, where the testator had two manors of that name, North Dale and South Dale, in which cases parol evidence of witnesses who spoke to the testator's intention was admissible to determine which of the two persons named respectively A B, or which of the manors of Dale was intended by the testator. That is to say where the identity of the person or thing intended by the testator has been the only point in dispute, and the description in the will has been insufficient to determine it." And, further down, he says: "The courts have uniformly professed to be governed by the admitted principle, that, *the judgment of a court in expounding a will should be merely declaratory of what is in the instrument.* This was the general rule at common law, before the statute, and if the statute has not strengthened its obligations, it certainly has not relaxed them," and, as to the effect of the statute, the author states that it, "by requiring a will to be in writing, precludes a court of law from ascribing to a testator any intention which his written will does not express, and, in effect, makes the writ-

ing the only legitimate evidence of the testator's intention. No will is within the statute but that which is in writing, which is as much as to say that all that is effectual to the purpose must be in writing, without it had been void by reason of the mistake both of the Christian and surname; but where is the distinction between a grant and a devise of land for the purpose under consideration?" This case was one where "Gertrude Yardley" was held entitled to a legacy which was given by the will to "Catharine Earnley." Again, on page 130, Wigram says: "The decisions, then, in the excepted cases must, it is conceived, be considered to a great extent as arbitrary, and not to be explained upon any determinate principle. They appear to be decisions in which the general principle has been sacrificed to meet the hardship of particular cases." One of the principal cases involving the admission of parol testimony to explain what the testator meant is the celebrated case of Goblet *v.* Beechey, reported in 3 Simon, page 24. It is well known that the origin of Mr. Wigram's book was in his criticisms on that case, where the Master of the Rolls allowed parol evidence to explain what was meant by a provision in the will. This ruling, however, was reversed by Lord Chancellor Brougham. After the decision in Goblet *v.* Beechey, came the case of Miller *v.* Traverse, in 8 Bingham. In that case the testator devised in a particular way all his estates in the county of Limerick and the city of Limerick. It appeared that the testator possessed estates in the city of Limerick, but none in the county, but that he had large posessions in the county of Clare, and the offer was made to prove that, in the original draft of his will, the devise had been of all his lands in the county of Clare and the city of Limerick, and that, by a blunder of the scrivener, the county of Limerick had been inserted for the county of Clare. This case was heard, on appeal, by Lord Lyndhurst and

Lord Chief-Justice Tindal, among other judges, and their opinions were delivered at great length and after mature examination, and it was there held unanimously by the judges that such evidence was inadmissible. In 18 Howard (see, also, 11 Wharton), in the case of Watkins against Allen, this case of Miller *v.* Traverse is adopted by the Supreme Court of the United States as expressing the correct position on the subject. The testator in the present case does not say that his property was in the city of Washington, and it cannot be doubted that parol evidence to that extent would be admissible by way of identifying the property named by him in the will, but the argument is that we can go further than this and correct the numbers as given for square and lot.

Now, the applicable cases seems to be confined to instances of what Lord Bacon calls "equivocation" in a will, recognizing the principle as laid down by him that parol evidence was admissible "where the persons or things may be equally designated by the same description," or where there is a description plain enough as to one part in the will and equivocal as to the other, the equivocal part may be rejected if enough remains to let us see what the testator really intended to express, or portions of the description may be rejected, provided there is something left certain, as, if a man, on writing his will on the back of a deed, should say "I give the piece of land conveyed to me by the within deed containing 100 acres, lying in the county of Dale," &c., he may have the number of acres wrong, he may have the county wrong and he may have the position wrong, and the name may be incorrect, and yet such a devise may be sustained, because a sufficient description of the property intended is evinced by his declaration that it is the property conveyed by the deed that is pointed out in the will—in

other words, one thing may be incorrect and be corrected by another, if there is anything to correct it by. In the Case of Wilkins et al. *v.* Allen, 18 Howard, page 285, the whole matter is decided on the strength of this English decision.

Now, applying these principles here, what can we do with the devise of this lot? The will says, "lot 6, in square 403," and it is said that ought to be read lot 3 in square 406. The first thing to do then is to strike out the number of the lot and then to strike out the number of the square. What then remains? nothing on earth but these "improvements." It is manifest that this will was not drawn by a lawyer; it jumbles "improvements" and appurtenances together, and leaves out words of limitation, and makes other blunders all the way through, and to admit parol testimony to give effect to the blunders of this man is to do the very thing which the statute was designed to prevent. The recent important cases seem to be within the principle I have just enunciated. For instance, a New Hampshire case where the property was described wrongly, but was identified as "the piece I bought of A;" a case reported in 2 Washington's Reports, where "a lot on Fourth street in the occupation of A and B" was held to pass a lot on Third street in the occupation of the persons named; a case in Indiana, where the north-east quarter of a township was devised and the north-west quarter was held to pass, the rest of the description being there sufficient; the case in 20 Missouri, on page 239, where the sections devised were right, but the township wrong, and the property was identified in the will by its accessibility to the "Big Spring;" the case of Fitzpatrick *v.* Fitzpatrick in 36 Iowa, where the testatrix devised the west half of the north-east quarter, which she did not own, instead of the east half of the south-west quarter, which

was her property, and where the plaintiff offered proof that a similar mistake to that insisted on in the case of Miller *v.* Traverse had occurred, and to prove by the scrivener that the description originally given to him was the correct one, but the offer of parol proof was rejected. In the case of Wetheree's Lessee *v.* Bascoville, the circumstances were quite touching, a settler in the far west, killed by Indians, while dying had at the door of his cabin dictated his will to a neighbor, it happened that, possibly through want of familiarity with the subject, the scrivener incorrectly recited the instructions of the testator, and this fact was so evident that the heirs for many years had held the property among themselves according to the verbal directions of the testator, and against the written devises in the will. When, however, a claim was made under the language of the will, the Supreme Court held that parol evidence of what the testator directed the scrivener to write was inadmissible and that the devises, as expressed in the will, were conclusive upon the rights of the parties. It results in the language of the court in the case of Jackson *v.* VanVachten, in 11 John, page 201, that "in cases of this kind, where there is no sufficient description in the will, independent of that which is false, the devise fails for uncertainty. It would be impossible for counsel ever to advise with confidence as to a title derived under a will if, as in the present instance, after the expiration of nearly fifty years, it is admissible by parol evidence to prove that a devise of property distinctly described in the will was in fact a devise of another portion not named in the will and differing in location and in all other points of description, and if, under the sanction of this Statute of Frauds, such evidence is to be admitted, we may well, in the language of an English judge, say that its title should be changed and that it should be called "an

act for the promotion of fraud and the encouragement of perjuries."

The rulings below are affirmed.

The CHIEF JUSTICE dissented.

The Chief Justice and Associate Justices Hagner and James sat in this case.

CASES CITED IN THE FOREGOING OPINION.

In the case of Walston's lessee *v.* White, 5th Maryland 297, the testator devised all his lands south of Beaver Dam Branch. The only questions in the case were of fact; what was Beaver Dam Branch and was the *locus in quo* south of it.

It was contended by the defendant that the branch which in the lower part certainly bore that name, in the upper part bore a different name. Evidence was received to prove what was known as Beaver Dam Branch, and both sides offered evidence of what the testator had been heard to call Beaver Dam Branch. Then the plaintiff asked the court to instruct the jury that "if they should find the stream located by the plaintiff as Beaver Dam Branch such in point of fact, and that the tract of land called Jerusalem was on the south side of it, then the plaintiff was entitled to recover." A second and third prayer were to the same effect and all were refused, the Defendant contended that the prayer "ought to have left to the jury the intention of the testatator in the use of the words."

The Court said the locations were questions of fact to be determined by the jury, and that the facts being determined in favor of the plaintiff his right to recover followed as a conclusion of law, and the prayers should have been granted.

There was no question in the case as to the admissibility of evidence.

Hammond *vs.* Hammond, 55 Maryland, 575. Testator bequeathed $2,500, to C. L. H. "for that he shall look after and take care of our beloved brother R. while he shall live, and bury him at his death." R. died before the testator. Upon bill filed for the construction of the will, the testimony of the draughtsman of the will and other witnesses was taken to prove by the declarations of the testator before and at the time of making the will, that the sum bequeathed was given as compensation for the services to be performed. This evidence being objected to, the court said the doubt arose "not from any obscurity or ambiguity on the face of the will but from the contest as to the rules of construction to be applied and the class of conditional bequests to which it belongs whether precedent or subsequent" and had " no difficulty in declaring it a condition subsequent and its performance becoming impossible by the act of Providence the legatee takes unconditionally." The testimony of the draughtsman and other witnesses was apparently rejected though not expressly passed upon. In the two Maryland cases as in Miller *vs.* Travers "here is no ambiguity."

Wilkins Executor of Allen *v.* Allen et al, 18 Howard, 385. The question in this case was whether the devise of the "surplus" after certain particular bequests and devises, "was intended to comprehend the whole remaining estate real as well as personal:" and this the Plaintiff in Error offered to prove by memoranda made by the testator "upon the basis of which his will was prepared," and by declarations made by him at and about the same time." The court held that the words of the will were not sufficient to include the lands in the surplus: and as to the offer of evidence to prove the testator's memoranda and declarations, the court said such evidence was "only admissible to